No. ——— 05-706 NOV 23 2005

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In The Supreme Court of the United States

WILMER K. BRECKENRIDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the standard applied by the Eleventh Circuit Court of Appeals in denying Petitioner's Certificate of Appealability violated Petitioners constitutional right and is inconsistent with Supreme Court precedents and other circuits. To allow such a decision to stand would establish precedent contrary to principles of procedural fairness, integrity and public reputation, resulting in a chilling effect on appellate advocacy in habeas corpus proceedings with unconstitutional ramifications.

2. Whether the Court may grant Petitioner's COA in lieu of granting a Writ for Certiorari.

LIST OF ALL PARTIES

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court.

1. **BRECKENRIDGE**, Wilmer Keith
   Defendant/Appellant/Petitioner

2. **BUTLER**, Honorable Charles
   United States District Court Judge

3. **KIMBROUGH** William, Jr.
   Trial Counsel for Petitioner

4. **LOFTON**, Richard J.
   AUSA/ Counsel for Respondent

5. **MILLER**, Cloud H., III
   Appellate Counsel for Petitioner

6. **SHEIN**, Marcia G.
   Appellate Counsel for Petitioner

7. **THOMPKINS**, Thomas
   Motion for New Trial Counsel for Petitioner

8. **YORK**, David P.
   AUSA/ Counsel for Respondent

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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No. _____

In The
Supreme Court of the United States

WILMER K. BRECKENRIDGE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit
Appellate Case No. 05-10468-F

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a *writ of certiorari* issue to review the decision rendered by the Eleventh Circuit Court of Appeals on July 13, 2005, which denied Petitioner a Certificate of Appealability ("COA"), as well as the Eleventh Circuit's Order of

August 26, 2005, which denied Petitioner a COA upon reconsideration.

The Eleventh Circuit has entered a decision in this case that not only squarely conflicts with relevant Supreme Court precedent, but also departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

OPINION BELOW

The opinions by the Eleventh Circuit Court of Appeals are unpublished opinions. Reference to the opinions is thereby limited to the following: ***Breckenridge v. United States***, No. 05-10468-F (11th Cir. 2005).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Eleventh Circuit on July 13, 2005, denying Petitioner a COA, as well as the Eleventh Circuit's Order on August 26, 2005, denying a COA upon reconsideration.

Pursuant to 28 U.S.C. § 1254(1), which provides in relevant part that "cases in the courts of appeals may be reviewed by the Supreme Court" "by writ of

certiorari," this Court has jurisdiction to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel. *Hohn v. United States*, 524 U.S. 236, 253 (1998).

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defence [sic]."

STATEMENT OF THE CASE

The June 1997 Federal Grand Jury for the Southern District of Alabama returned a seventy-five count superseding indictment against Petitioner and thirty-six codefendants, charging, in pertinent part, the following: **Count 2**- conspiracy to possess with intent to distribute more than 10 kilograms of crack-cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; **Count 3**- conspiracy to possess with intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846; **Counts 13, 23, 26, 27, 28, 30, 31, 33, 36, 40, 66, 69**- on separate dates, possession with intent to distribute various amounts of crack-cocaine, in violation of 21 U.S.C. § 841(a)(1); **Count 14**- possession with intent to distribute 1/8 of a kilogram of crack-cocaine, in violation of 21 U.S.C. § 841(a)(1); **Counts 24, 73**- on separate dates, possession with

intent to distribute various amounts of marijuana, in violation of 21 U.S.C. § 841(a)(1); and, **Count 67**- attempt to possess with intent to distribute 1 ounce of crack-cocaine, in violation of 21 U.S.C. §§ 841 and 846.

The above-referenced charges and convictions in this case stem from an investigation into cocaine trafficking in which Petitioner, a deputy sheriff, was alleged to have been receiving bribes from drug dealers in return for leniency, supplying drugs for sale, and receiving a share of the proceeds from the drug sales.

On August 4, 1997, Petitioner proceeded to trial along with six codefendants. On August 25, 1997, the jury returned a verdict of guilty as to Petitioner on Counts 2, 3, and 73, and acquitted of the charges on Counts 13, 24, 28, 30, 33, 36, and 40. Charges not part of the verdict were dismissed pursuant to government motion.

On December 6, 1997, Petitioner filed a Motion for New Trial ("MFNT"). The MFNT was based on a post-conviction investigation undertaken by Petitioner, which resulted in voluminous exculpatory evidence being discovered. By Order dated September 11, 1998, Petition's Motion for New Trial was denied.

Petitioner, a first offender, was sentenced on December 11, 1997 to life imprisonment on Count 2, twenty years imprisonment on Count 3, and five years imprisonment on Count 73, all to run concurrently. The term of imprisonment is to be followed by five years of supervised release on Counts 2 and 3, and five

years of supervised release on Count 73, to run concurrent.

A timely Notice of Appeal was filed for Petitioner. Jurisdiction in the Eleventh Circuit Court of Appeals was proper pursuant to 28 U.S.C. § 1291. On appeal, Petitioner raised the following issues:

(1) Whether the district court erred in denying Petitioner's Motion for New Trial;

(2) Whether Petitioner's due process rights were violated through prosecutorial misconduct;

(3) Whether sufficient evidence existed to sustain Petitioner's conviction;

(4) Whether the district court erred in imposing sentence upon Petitioner; and,

(5) Whether Petitioner's Sixth Amendment right to the effective assistance of counsel was violated.

On September 4, 2002, the Eleventh Circuit Court of Appeals affirmed Petitioner's conviction and sentence. A Petition for Writ of Certiorari was timely filed. The United States Supreme Court denied Certiorari on March 3, 2003.

On March 1, 2004, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence by Person in

Federal Custody pursuant to 28 U.S.C. § 2255, asserting that trial counsel and MFNT counsel denied Petitioner his Sixth Amendment right to effective assistance of counsel as guaranteed by the United States Constitution. Specifically, Petitioner argued the following acts and omissions fell below the standard for reasonable professional representation:

(1) Trial counsel was ineffective for failing to conduct a sufficient investigation, utilize evidence that was provided to him, and to investigate, interview, and/or subpoena available witness;

(2) Trial counsel was ineffective for failing to object to *Brady* and *Jencks* violations;

(3) Trial counsel was ineffective for failing to investigate and uncover witnesses and/or evidence to discredit a codefendant's testimony and to bolster Petitioner's trial testimony;

(4) Trial counsel was ineffective for failing to challenge the constitutionally defective indictment;

(5) MFNT counsel was ineffective for failing to assert ineffective assistance of counsel in the MFNT; and,

(6) MFNT counsel was ineffective for failing to file a timely MFNT.

The district court issued its Order denying Petitioner's § 2255 Motion on November 23, 2004, without holding an evidentiary hearing. A Motion for Reconsideration was subsequently filed and denied.

A timely Notice of Appeal and application for a Certificate of Appealability was filed in the district court. The district court denied the COA by Order dated April 26, 2005.

Pursuant to Fed. R. App. P. 22(b)(2), Petitioner filed an 86-page request for a COA in the Eleventh Circuit Court of Appeals on June 3, 2005. The issues presented to the court are as follows:

(1) Whether the district court erred in denying Petitioner's claim that his Fifth and Sixth Amendment rights were violated for ineffective assistance of counsel, combined with evidence to support the admitted ineffectiveness, all of which should have been presented to the jury. Petitioner has made a threshold (sic) of the denial of his constitutional rights.

(2) Whether the district court erred by failing to address Petitioner's Sixth Amendment right to effective assistance of counsel as applied to the indictment and jury determination found in Issue II of the habeas corpus petition.

(3) Whether the district court erred in denying *United States v. Booker* as a watershed decision applying to Petitioner as a result of a 2255

habeas petition being considered part of the direct review process as a result of AEDPA.

Petitioner subsequently filed a Motion to Exceed Page Limit on June 16, 2005, in order for the court to consider the voluminous evidence and a full presentation of Petitioner's argument, specifically on the first issue. The Eleventh Circuit issued its Opinion on July 13, 2005, simultaneously granting the Motion to Exceed Page Limit and denying the COA. In said Opinion, the court found that Petitioner's claims were merely conclusory and unsupported by specifics, and that Petitioner "failed to make a substantial showing of the denial of a constitutional right."

Petitioner filed a Motion to Reconsider or Modify Order on August 1, 2005. In said Motion, Petitioner specifically challenged the standard of review and applicable caselaw applied by the Eleventh Circuit in denying the COA. The Eleventh Circuit denied the COA upon reconsideration on August 26, 2005, "because appellant has failed to make a substantial showing of the denial of a constitutional right."

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard as this case departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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ARGUMENT FOR ALLOWANCE OF THE WRIT

I. WHETHER THE STANDARD APPLIED BY THE ELEVENTH CIRCUIT COURT OF APPEALS IN DENYING PETITIONER'S CERTIFICATE OF APPEALABILITY VIOLATES PETITIONERS CONSTITUTIONAL RIGHT AND IS INCONSISTANT WITH SUPREME COURT PRECEDENT AND OTHER CIRCUITS. TO ALLOW SUCH A DECISION TO STAND WOULD ESTABLISH PRECEDENT CONTRARY TO FUNDAMENTAL PRINCIPLES OF PROCEDURAL FAIRNESS, INTEGRITY AND PUBLIC REPUTATION, RESULTING IN A CHILLING EFFECT ON APPELLATE ADVOCACY IN HABEAS CORPUS PROCEEDINGS WITH UNCONSTITUTIONAL RAMIFICATIONS.

The Antiterrorism and Effective Death Penalty Act of 1996 (also known as "AEDPA") was signed into law on April 24, 1996 to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." It was passed by a Republican-controlled legislature following the Oklahoma City bombing and signed into law by Democratic President Bill Clinton. AEDPA effectively imposes a limit for all appeals relating to the right to writ of habeas corpus and reduces the length of the appeal process by sharply limiting the role of the federal courts.

Prior to AEDPA, a state prisoner wishing to appeal a federal district court's denial of a petition for a writ of habeas corpus was required to apply for a

certificate of probable cause ("CPC"), as codified by 28 U.S.C. § 2253. Congress added the CPC requirement in 1908 because of delays in state capital cases caused by perceived "frivolous" appeals in federal habeas cases. *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 to 893 (1983); *See also* Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307, 313-14 (1983) (discussing history of 1908 legislation). The CPC, once issued, encompassed every ground for relief raised in the petition for writ of habeas corpus, including any procedural defaults found by the district court. All issues were ripe for appellate review.

As part of AEDPA, Congress amended § 2253 and renamed the CPC a "certificate of appealability" ("COA"). Pub. L. No. 104-132, 102, 110 Stat. 1217 (1996). For the first time, the COA requirement was extended to federal prisoners who file post-conviction motions under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B). The amended statute provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

The requirements of § 2253(c) were elaborated upon in *Slack v. McDaniel*, 529 U.S. 473 (2000), which declared that the substantial showing of a constitutional right that a habeas prisoner must make to obtain a COA "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). The *Slack* Court continued,

> where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Id. at 484. This standard does not require the habeas petitioner to demonstrate a likelihood that he ultimately will prevail on appeal. Accordingly, a COA should not be denied merely because the court believes the petitioner will not prove an entitlement to relief. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2000).

The *Slack* standard for meeting § 2253(c)'s "substantial showing" requirement was reiterated and further elaborated on in *Miller-El*, 537 U.S. at 326-27, 335-38, 342. In *Miller-El*, the Court emphasized that while it reversed the denial of a COA in that case, its holding in *Slack*

> should not be misconstrued as directing that a COA must always issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners. . . . By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be *pro forma* or a matter of course.

537 U.S. at 337.

Several circuits agree that the requirement that a petitioner seek a certificate of appealability is a gate-keeping mechanism that protects circuit courts from having to devote resources to frivolous issues, while at the same time affording petitioners an opportunity to persuade the court that, through full briefing and argument, the potential merit of claims may appear. *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000); *See also Soto v. United States*, 185 F.3d 48 (2nd Cir. 1999);

Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001); *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997); *United States v. Talk*, 158 F.3d 1064, 1065 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999). It is therefore essential for the circuit courts to engage in a reasoned assessment of each of petitioner's claims when determining whether a COA should issue in order to separate frivolous claims from viable ones. *See Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001) (noting that both blanket grants as to all issues and blanket denials "undermine the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability"). No such opportunity was afforded Petitioner.

In this case, the Eleventh Circuit Court of Appeals failed to undertake the proper individualized analysis of each claim in considering whether to grant a COA and instead made a blanket conclusive/non clarifying decision to deny relief. The court categorized Petitioner's claims generally and determined that each group would not entitle Petitioner to habeas relief. Specifically, the court found:

> First, appellant raises 12 claims that trial counsel was ineffective for failing to call as witnesses or properly cross-examine particular individuals. With respect to each of these claims, appellant failed to show either that counsel's performance was deficient in failing to call these

witnesses or that counsel's failure to do so prejudiced the outcome of this case.

Second, appellant raises eight claims relating to counsel's alleged ineffectiveness for failing to introduce particular items of evidence at trial. Likewise, appellant failed to demonstrate either deficiency or prejudice with respect to these claims, particularly since much of this evidence was inadmissible under Federal Rule of Evidence 608(b).

Third, appellant raises six claims that the district court failed to address particular arguments he made in his motion to vacate. A review of the district court's order indicates that all claims were clearly delineated as claims in appellant's motion to vacate were addressed by the district court.

. . .

Next, appellant asserts that he established ineffective assistance of counsel before the district court because he submitted affidavits of his trial attorneys in which they admitted that they committed errors at trial. We have noted that, because the standard for ineffective assistance of counsel is an objective one, the fact that trial counsel (at a post-conviction evidentiary hearing) admits that his

> performance was deficient matters little. (internal quotation and citation omitted). Absent an independent showing that counsel's performance met the Strickland standard, the affidavits of the attorneys were not dispositive.
>
> . . .
>
> Finally, because appellant failed to show that any of the claims that he raised in his [habeas motion] had merit, the district court did not abuse its discretion in failing to hold an evidentiary hearing. (internal citation omitted).

(7/13/05 Order at 2, 3, 4). The court failed to provide any determination whatsoever as to whether Petitioner had made a "substantial showing of the denial of a constitutional right" pursuant to § 2253(c)(2) and the standards set forth by the Supreme Court in *Slack* and *Miller-El*.[1] Such a generalized blanket denial of a COA by the circuit court on these issues effectively delegated the COA determination process to this Court, thereby undermining the gate keeping function of certificates of appealability. Such statements do not comport with the proper review process.

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[1] This error was brought to the Eleventh Circuit's attention by means of Petitioner's Motion to Reconsider, Vacate or Modify Order filed on August 1, 2005. The court, however, came to the same conclusion upon reconsideration without further explanation.

Moreover, these claims were presented by Petitioner collectively as evidence supporting one issue, namely, whether the district court erred in denying Petitioner's claim that his Fifth and Sixth Amendment rights were violated for ineffective assistance of counsel, and not as individual claims warranting a COA. The ineffective assistance of counsel claim arises out of counsel's admitted failure to adequately conduct a pretrial investigation.

To demonstrate ineffective assistance, a convicted defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one in which counsel made errors so serious that she was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* To meet the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In the context of defense counsel's duty to investigate, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. *See*

Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). Although an attorney's informed strategic choices are generally given great deference, an attorney's preparatory activities are closely scrutinized. *Chambers v. Armontrout*, 907 F.2d 825, 831, 835 (8th Cir. 1990) (en banc).

The circuit courts are in agreement that failure to adequately conduct a pretrial investigation generally constitutes a clear instance of deficient performance. *See, e.g., Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel's performance fell below competency standard where he interviewed only one witness); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) ("at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case"); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) ("Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation"); *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) ("A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance").

In assessing prejudice, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a

reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. A verdict that is only weakly supported by the record is more likely to be affected by errors than one with overwhelming record support, and, in such a case, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 696; *United States v. Agurs*, 427 U.S. 97, 113 (1976).

Strickland directs that the effect of counsel's inadequate performance must be evaluated in light of the "totality of the evidence before the judge or jury," keeping in mind that "[s]ome errors have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. . . ." *Id.* at 695-96. Counsel's errors are, therefore, to be considered in the aggregate. *See Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that court should examine cumulative effect of errors committed by counsel); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999) ("Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense"); *cf. Rodriguez v. Hoke*, 928 F.2d 534, 538 (2nd Cir. 1991) (dismissing case for failure to exhaust claims, but noting, "[s]ince [the defendant's] claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together"); *McNeil v. Cuyler*, 782 F.2d 443, 450 n.2 (2nd Cir. 1986) (evidence that would have been obtained by counsel had he conducted a reasonable investigation must be assessed in relation to the record as a whole to determine whether there is a reasonable probability

that such evidence would have led the jury to have a reasonable doubt respecting the defendant's guilt).

Petitioner asserted in his habeas petition and application for a COA that there was evidence available through affidavits of witness, documents and his attorneys, that counsel failed to investigate which would have corroborated his defense at trial and undermined the government's case. Coupled with the vulnerability of the defense and counsel's admission that his failure to investigate and use such evidence was admittedly not a strategic decision, counsel's performance was deficient. The cumulative effect of the omitted evidence resulting from the ineffective assistance of counsel prejudiced Petitioner to the extent that confidence in the outcome of the trial was undermined, *i.e.*, there is a reasonable probability that the trial's outcome would have been different with evidence impeaching the government's key witnesses, corroborating Petitioner's testimony, and advancing a viable theory of defense, thus providing Petitioner with a significantly different trial than he might have received if represented by a competent attorney.

An overwhelming amount of case law from various circuits has reached similar conclusions. In *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993), for example, the court found that defense counsel's performance was deficient when he failed to investigate an impotency defense in a rape case, even though the attorney presented an alibi defense at trial, because "the vulnerability of the alibi evidence shows the unreasonableness of the attorney's failure to investigate further and present the impotency

defense." *Id.* at 726. The *Foster* Court further noted that "[the defendant's] attorney focused only on whether [the defendant] possibly could have committed the crime and not on whether or not it was likely he could have committed the crime." *Id.* (internal quotation and citation omitted). As the evidence showed that the defendant was incapable of committing the crime in the manner the government alleged at trial, the *Foster* Court concluded there was a reasonable probability that the trial's outcome would have been different with the evidence and, thus, counsel's deficient performance prejudiced the defense. *Id.* at 727.

In *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989), counsel's performance was deemed to fall below the minimum standard of reasonable professional representation required under *Strickland* for failing to pursue a given line of investigation when his "behavior was not colorably based on tactical considerations but merely upon a lack of diligence." *Id.* at 712. The *Gray* Court based its finding on counsel's admission that he made no effort to interview potential witnesses, the fact that counsel did not hire an investigator to locate potential witnesses, and because counsel offered no strategic justification for his failure. *Id.* Further, because the defendant in *Gray* offered evidence to the court as to the testimony available from specific witnesses that counsel failed to interview who would have corroborated the defense and cast doubt on the government's case, the court held that counsel's ineffective assistance prejudiced the defendant. *Id.* at 714.

In *Horton v. Massey*, 203 F.3d 835 (10th Cir. 2000) (unpublished), counsel's performance was adjudged constitutionally ineffective in relation to his failure to adequately investigate the case "in light of the avenues that he could have taken to present significant evidence that the [government's] key witnesses collaborated with one another and were lying about both their and petitioner's participation in the [crime]." In *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), counsel's performance was determined to fall outside the wide range of professionally competent assistance that *Strickland* requires when he chose not to develop and use evidence available at his fingertips that could have undermined the government's case and offered no persuasive justification for such a decision. In *Williams v. Washington*, 59 F.3d 673, 679-685 (7th Cir. 1995), counsel's failure to investigate was held to meet the *Strickland* standard where an investigation would have disclosed information bolstering the defendant's credibility and rebutting the government's case because the defendant was provided "with a trial significantly different than she might have received if represented by a competent attorney." In *Nealy v. Cabana*, 764 F.2d 1173, 1180 (5th Cir. 1985), the Court concluded that the defendant met the burden of showing prejudice related to counsel's failure to investigate under *Strickland* where the testimony of missing witnesses directly contradicted prosecution witness and supported defense's theory of the case.

Thus, reasonable jurists could have found that the district court's assessment of Petitioner's ineffective assistance of counsel claim was debatable or wrong. The COA should have been granted, as Petitioner

made a substantial showing that he was denied the constitutional right to effective assistance of counsel. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991). Because the Eleventh Circuit egregiously applied the wrong standard in determining whether to grant the COA, certiorari review is required in this case.

Moreover, to allow such a decision to stand would establish precedent that directly contradicts relevant Supreme Court precedent *Slack* and *Miller-El*. The Eleventh Circuit's denial of Petitioner's COA is tantamount to a finding that the habeas appeal is frivolous or borders on frivolousness. *See Barefoot*, 463 U.S. at 892-94 (stating that "the primary means of separating meritorious from friviolous appeals should be the decision to grant or withhold a certificate of probable cause" and that "the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous"). However, a claim for relief is "legally frivolous" only if it "is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case." *Id.* at 894. An issue is nonfrivolous if that issue is "debatable among jurists of reason" *Id.* at 893 n.4. Petitioner's case is overwhelmingly debatable against the facts presented and the law if applied correctly.

In cases where the Eleventh Circuit deems such habeas issues to be frivolous, the effect would be that the prisoner's appeal is summarily dismissed without careful judicial consideration, negating the gate keeper role intended by Congress. The systematic impact of this trend would be a chilling effect on appellate

advocacy in habeas cases that results from increased threats of sanctions by the court, *see, e.g., United States v. Salazar-Olivares*, 179 F.3d 228, 230 (5th Cir. 1999) (threatening appellant's counsel that future appeals deemed frivolous could result in sanctions imposed by the court), and, possibly, the actual imposition of monetary sanctions on court-appointed appellate counsel. *See United States v. Gaitan*, 171 F.3d 222, 224 (5th Cir. 1999). Such sanctions would severely impact the effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution.

In conclusion, the Eleventh Circuit's finding that Petitioner's application for a COA failed to make a substantial showing of the denial of a constitutional right conflicts with relevant Supreme Court precedent and could have adverse Sixth Amendment ramifications. As such, it is respectfully requested that this Honorable Court exercise its authority to fashion relief in the interest of justice: to allow such a decision to stand would result in a miscarriage of justice and establish Eleventh Circuit precedent contrary to fundamental principles of fairness, integrity and public reputation of judicial proceedings. The Eleventh Circuits procedure in deciding COA's is constitutionally flawed and must be corrected to protect Petitioner and others who follow.

II. THE COURT MAY GRANT PETITIONER'S COA IN LIEU OF GRANTING A WRIT FOR CERTIORARI.

At the time Congress added the CPC requirement in 1908, as discussed *supra*, federal circuit courts did not possess appellate jurisdiction over a lower court's denial of a habeas petition and, instead, an appeal of the denial of habeas relief went directly to the Supreme Court. *Grammer v. Fenton*, 268 F. 943, 946-47 (8th Cir. 1920); *See also* Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. at 313-14 (the 1908 CPC statute not only authorized a federal trial judge to grant or deny an application for a CPC but also authorized a "justice of the Supreme Court" to do so).

A 1925 amendment to the CPC statute deleted the reference to a Supreme Court Justice's having the authority to grant or deny a CPC, and gave that authority to the circuit courts. *Id.* at 313 n.36. In 1948, Congress again amended the CPC and restored the 1908 statute's provision that a Supreme Court Justice possessed the authority to rule on a CPC application (in addition to the authority of a district judge to do so). *Slack v. McDaniel*, 529 U.S. 473, 480 (2000) (quoting Act of June 25, 1948, 62 Stat. 967); *See also* Sen. Rpt. 1559, at 9 (June 9, 1948); H.R. Rpt. 308, at app. (April 25, 1947). Congress continued to give Supreme Court Justices the authority to grant or deny a COA with the enactment of AEDPA. 28 U.S.C. § 2253(c)(1).

Thus, Petitioner respectfully requests this Honorable Court to exercise its discretionary power

and grant Petitioner's COA in lieu of granting a Writ for Certiorari, based on the applicable case law and the substantial showing of the denial of a constitutional right set forth in Issue I, *supra*, and in the interest of judicial economy.

CONCLUSION

The aforementioned error creates a serious question of confidence in the outcome of Petitioner's prosecution, conviction, and sentence. If confidence in the outcome of a judicial proceeding is questioned, the matter should be remanded for further proceedings. To do anything different would be a miscarriage of justice.

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari, or, in the alternative, the COA.

/s/ Marcia G. Shein
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-10468-F

WILMER KEITH BRECKENRIDGE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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[ENTERED: July 13, 2005]

ORDER:

Appellant, who is represented by counsel, has filed a motion for a certificate of appealability. Appellant appeals the denial of his motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Appellee has moved to strike appellant's 86-page motion for a certificate of appealability. In response, appellant has moved for leave to exceed the

page limit in his motion. Appellee's motion to strike the motion for certificate of appealability is DENIED. Appellant's motion to exceed the page limit in his motion is GRANTED.

In (the motion to vacate, appellant raised more than 50 claims of ineffective assistance of counsel at the trial stage and at the motion for new trial stage. Appellant raises 33 issues in his motion for a certificate of appealability.

To make a successful claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense, Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 LEd.2d 674 (1984). Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases. Id. at 688, 104 S. Ct. at 2065. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been diffident" Id. at 694, 104 S. Ct. at 2068. Mere conclusory claims and allegations unsupported by specifics are insufficient entitle a petitioner to habeas relief. Tejada v. Dugger, 941 R2d 1551, 1559 (11th Cir. 1991).

First, appellant raises 12 claims that trial counsel was ineffective for failing to call as witnesses or properly cross-examine particular individuals. With respect to each of these claims, appellant jailed to show either that counsel's performance was deficient in failing to call these witnesses or that counsel's failure to

do so prejudiced the outcome of his ease. Second, appellant raises eight claims relating to counsel's alleged ineffectiveness for failing to introduce particular items of evidence at trial. Likewise, appellant failed to demonstrate either deficiency or prejudice with respect to these claims, particularly since much of this evidence was inadmissible under federal Rule of Evidence 608(b). Third, appellant raises six claims that the district court failed to address particular arguments he made in his motion to vacate. A review of the district court's order indicates that all claims that were clearly delineated as claims in appellant's motion to vacate were addressed by the district court.

Appellant also argued that the district court should have granted his claim that his counsel was ineffective for failing to raise a challenge to his sentence under Apprendi v. New Jersey, 530 U.S. 466.120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), a decision that was issued while his direct appeal was pending. Nevertheless, counsel is not ineffective for failing to anticipate a change in the law, Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994). Accordingly, this claim was without merit. Further, appellant argues that the district court erred in concluding that the U.S. Supreme Court's recent decision in United States v. Booker, 543 U.S.____, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), was not retroactively applicable to his case. However, the district court's decision was consistent with this Court's precedent. Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005).

Next, appellant asserts that he established ineffective assistance of counsel before the district court

because he submitted affidavits of his trial attorneys in which they admitted that they committed errors at trial. We have noted that, because the standard for ineffective assistance of counsel is an objective one, the fact "that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little." Chandler v. United States, 218 F.3d 1305, 1315 n. 16 (11th Cir. 2000). Absent an independent showing that counsel's performance met the Strickland standard, the affidavits of the attorneys were not dispositive.

Appellant also failed to establish that the attorney who represented him in his motion for new trial was ineffective for filing the motion outside the seven-day time limit for motions seeking anew trial in the interests of justice. Appellant failed to make any showing that counsel's actions prejudiced the outcome of his case, other than the conclusory allegation that the motion for new trial would have been granted if it was filed within seven days of the verdict. See United States v. Jones, 614 F.2d 80, 82 (5th Cir. 1980) (holding that a movant's conclusory statements, unsupported by specific facts nr by the record, are insufficient to state a constitutional claim in a collateral proceeding).

Appellant argues that he established that counsel was per se ineffective under one of the categories set forth in United Slates v. Cronie, 466 U.S. 648, 658-59,104 S. Ct. 2039, 246-47, 80 L.Ed.2d 657 (1984), specifically that there had been a "complete denial of counsel," and that he was denied the presence of counsel "at a critical stage." He also argues that the district court applied the "wrong standard" to his

claims because the court failed to evaluate them under Cronic. However, appellant failed to present any evidence or argument to support these conclusory allegations that his counsel was per se ineffective. See Jones, 614 F.2d at 82. Finally, because appellant failed to show that any of the claims that he raised in his motion to vacate had merit, the district court did not abuse its discretion in failing to hold an evidentiary hearing. Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991).

Based on the foregoing, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 97-00099-CB
	)	CIVIL ACTION NO. 04-0132-CB
WILMER KEITH BRECKENRIDGE,	)	
Defendant/Petitioner.	)	

[ENTERED: November 23, 2004]

ORDER

This matter is before the Court on a motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255 on behalf of Wilmer Keith Breckenridge, a person in federal custody.[1] After considering each of the issues raised in petitioner's motion in light of the record, the Court concludes that the motion is due to be denied without an evidentiary hearing.

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[1] Petitioner is represented by counsel in this proceeding.

I. Factual and Procedural Background

A. The Investigation

For several years in the mid-1990's, the Alabama Bureau of Investigation (ABI), later joined by the Drug Enforcement Administration (DEA), conducted an investigation of drug- trafficking in and around Uniontown, Alabama, a small town in rural Perry County near the Marengo County line. During the course of their investigation, the ABI and DEA suspected that drug dealers were being tipped off by someone in local law enforcement, and they were eventually able to obtain authorization to conduct wire tap surveillance of suspected drug dealers in the Uniontown area, including Cedric Jones. The arrest of Robert Pickens, a deputy with the Marengo County Sheriff s Department (MCSD), on May 16, 1997, marked the beginning of the end of the investigation. Pickens was arrested after purchasing 10 pounds of marijuana from an undercover agent, then leading arresting officers on a high-speed chase during which he rammed his vehicle into a vehicle driven by an ABI officer, causing both vehicles to crash. After his arrest, Pickens confessed to taking payoffs from drug dealers and implicated petitioner Wilmer Keith "Sonny" Breckenridge, who was a sergeant with the Marengo County Sheriff's Department (MCSD).

Pickens, Breckenridge and 35 others were indicted on May 27, 1997. Ultimately, the superseding indictment charged a total of 73 substantive counts against 37 defendants. Breckenridge was charged with conspiracy to possess with intent to distribute crack

cocaine (Count Two), conspiracy to possess with intent to distribute marijuana (Count Three), numerous substantive counts based a *Pinkerton* theory of coconspirator liability and one substantive count, based on an aiding and abetting theory, arising from Pickens' purchase of marijuana from an undercover agent (Count Seventy-Three).

B. The Trial

Due to the magnitude of this case, the defendants were divided into groups, and three separate trials were held in August and September of 1997. Petitioner and six codefendants were the first group of Uniontown defendants to be tried. Jury selection took place on August 4, 1997, and trial commenced on August 7, 1997. The presentation of evidence concluded on August 20, 1997.

At trial the government presented an array of evidence against Breckenridge, the most damaging of which was the testimony of Pickens and another codefendant, Cedric Jones, a drug dealer whose family was the nucleus of the Uniontown drug conspiracies.[2] Pickens testified about Breckenridge's extortion of money from drug dealers, including Cedric Jones, Billy Treadwell and Edward Lofton. Pickens related an initial meeting between himself, Cedric Jones and Breckenridge that took place at a Burger King in Selma, Alabama in 1994. At that meeting, according to Pickens, Breckinridge showed Jones a fake arrest warrant and solicited protection payments of $2,000

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[2] Cedric Jones is the nephew of Gerald "Tommy" Jones and the___of Darryl Jones.

per month. Jones balked at the amount, and the parties agreed to $1,000 per month. Pickens also testified about subsequent occasions where he and/or Breckenridge met Jones to pick up the payments. In addition to his testimony about the extortion, Pickens related instances where Breckenridge provided drugs, specifically crack and marijuana, for Jones to sell. Some of the drugs were from the MCSD evidence room, but some of the marijuana was homegrown by Breckenridge, according to Pickens.

Regarding Breckenridge's involvement in the marijuana purchase, Pickens testified that it was Breckenridge's idea that Pickens make contact with Buster Glover, a well-known marijuana dealer, to see if he could arrange to purchase some marijuana for Cedric Jones to sell. Glover put Pickens in touch with the undercover agent, who offered to sell Pickens 10 pounds of marijuana for $8,000. According to Pickens, he and Breckenridge agreed to split the cost 50/50. Pickens borrowed $4,000 for his part, and Breckenridge provided Pickens with $4,000 in cash on the morning the purchase was scheduled. Arrangements were made for Pickens to meet the undercover agent, who went by the name "Wild Man", in Choctaw County at 6:30 that evening. Pickens stopped by the MCSD and spoke with Breckenridge on his way to the meeting. Pickens testified that he and Breckenridge decided to meet at Compton's Store in Nanafalia after the buy so they could transfer the marijuana to Breckenridge's patrol car. Compton's Store was on the road to Choctaw County and was about 10 to 15 minutes from the ballpark in Sweetwater. The plan was for Breckenridge to take the marijuana to Jones.

Cedric Jones testified about his own dealings with Breckenridge. He corroborated Pickens testimony about the meeting at Burger King in Selma and about the $1,000 per month payoffs. Jones also related an incident in which he went to Breckenridge for help on behalf of Darryl Harris, who had been arrested with a substantial amount of marijuana. Jones gave Breckenridge $700, and Breckenrdige promised to get Pickens to talk to the District Attorney. Harris subsequently got probation. In addition to taking payoffs from him, according to Jones, Pickens and Breckenridge also gave him crack and marijuana to sell. Jones also confirmed details about the plans for the 10 pounds of marijuana. According to Jones, Breckenridge and Pickens told him of their plan, in general, and he agreed to resell the marijuana for them. Near the end of April 1997, Jones met Breckenridge and Pickens at the water tower where they discussed getting the price down from $1,000 to $900 per pound.

Others also testified about pay-offs and extortion attempts by Breckenridge. Huriel "Billy" Treadwell testified that he had paid bribe money to Breckenridge on a regular basis in exchange for protection for his drug business. Tony Preston and his mother, Pearlie Mae Preston, testified that Breckenridge attempted to extort money from them to secure Tony Preston's release on a drug-related charge but that they refused.

While the foregoing evidence was direct, damaging and would have been sufficient for conviction, the government did not stake its case upon the testimony of drug dealers and codefendants.

Instead, the government's case was supported by a substantial amount of corroboration. The government presented two tape recorded telephone conversations between Breckenridge and Cedric Jones, recorded pursuant to a government wire tap of Cedric Jones' telephone. In the first, which took place on March 25, 1997, Sonny Breckenridge called Jones to arrange a 9:00 p.m. meeting at the water tower. On March 27, 1997, Jones called Breckenridge to talk about the arrest of Cedric Jones' uncle, Darryl Jones. In addition, two telephone conversations recorded between Cedric Jones and Pickens on April 24, 1997 also implicated Breckenridge. In the first, Jones and Pickens arranged a meeting at Foskey Park, and in that conversation Pickens indicated that another person would be with him. Jones testified that Breckenridge was the other person. In a subsequent conversation on the same day, Pickens called Jones to change the location of the meeting to the water tower and indicated that Pickens and the other person would be in a truck. According to Jones, the truck belonged to Breckenridge, and the meeting was to discuss the 10 pounds of marijuana.

In addition to the tape recorded conversations, the government presented telephone and pager records. Those records showed that over a three-month period prior to their arrests, Cedric Jones had made 28 telephone calls to Breckenridge or to his pager and that Breckenridge had made 37 calls to Cedric Jones or to his pager.[3]

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[3] A number of the calls were to pager numbers; some were to telephone numbers.

Testimony about the MCSD painted a picture of the atmosphere in which Breckenridge and the MCSD operated. Breckenridge's position as sergeant and chief drug enforcement officer for MCSD provided him with a considerable amount of authority in a department where oversight was lax. During the months before Breckenridge's arrest, a federal investigation of Sheriff Roger Davis was ongoing,[4] a fact that was known to Breckenridge and other MCSD employees. From the evidence presented by the government, it appeared that Davis allowed Breckenridge free reign. Breckenridge was in charge during the evening and night shifts.[5] Breckenridge decided job assignments for each shift, which meant that he could keep deputies out of particular areas if he were so inclined.

As part of his position, Breckenridge had easy, unchecked access to illegal drugs. He was assigned an office in the Marengo County Courthouse which was located in a separate building from the MCSD. That office was connected to the Department's evidence room, where confiscated drugs were stored. The MCSD had no established procedures for handling evidence. Breckenridge, Sheriff Davis and Chief Deputy Reeves were the only people who had keys to the evidence

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[4] The investigation of Sheriff Davis was unrelated to the Uniontown investigation that gave rise to the indictments in this case. On August 22, 1997, during the Uniontown trials, Davis was arrested and subsequently pled guilty to extortion. *United States v. Roger W. Davis*, Criminal Action 97-00179.

[5] Although there was a chief deputy who was higher in rank than Breckenridge, the consensus among the MCSD employees was that Breckenridge spoke for the sheriff and that Breckenridge had greater authority than the chief deputy.

room, which was described by almost everyone as "a mess." Among the irregularities described by law enforcement officers from MCSD and other agencies were unsealed envelopes of crack cocaine and packages of marijuana with no evidence stickers.

Deputies who worked with Breckenridge testified that Cedric Jones was well-known to them and to Breckenridge as a drug dealer. Breckenridge had never indicated to any of them that Jones was his informant. In fact, one of the deputies, Kevin Kagel, testified that Breckenridge's relationship with Jones made him uncomfortable because it seemed like Jones was trying to intimidate Breckenridge and that Jones acted too familiar with Breckenridge. Deputy Randy Sanders testified as to a unusual conversation he had with Breckenridge about Jones. Breckenridge was on the telephone at the MCSD, and when he hung up he told Sanders that Cedric Jones had called to ask where the MCSD would be that night. While Sanders thought it odd that a drug dealer would call the Sheriff's Department, Breckenridge told Sanders that the department's actions must have had an effect on Jones and had him running scared.

Breckenridge was also tied to the crack cocaine conspiracy charge by the testimony of Fritz Paul, a codefendant. Paul lived in California and came to Uniontown on several occasions to arrange for the transportation of cocaine to other parts of the country. Cedric Jones told Paul that he had two police officers who "would give him information and stuff like that" and "who would kind of let him slide on his drug dealing." (Tr. at 770 & 882.) Once, when Paul was at

Gerald Jones' house, an unmarked police car similar to the one drive by Breckenridge pulled into Gerald Jones' property. Cedric came over and told Paul that those were the police officers he had been talking about. The only name Paul heard Cedric Jones mention in connection with either of these officers was "Sonny".

Breckenridge's actions around the time of Pickens' arrest corroborated the government's theory that Breckenridge and Pickens were partners in the undercover marijuana deal. Two days before Pickens was arrested Breckenridge withdrew $3,000 from a savings account held jointly with his wife. The same day that Pickens was arrested Breckenridge withdrew $1,000 from a separate account. The Monday after the arrest, Breckenridge deposited $3,000 back into the joint account.

After learning that Pickens was in trouble and that ABI agents were not particularly happy to see him at the scene of the car crash, Breckenridge behaved oddly, according to his coworkers. That night, Breckenridge returned to the Sheriff's Department where several other deputies had gathered. Breckenridge appeared "flustered, flabbergasted, scared." (Tr. at 1446.) Even though no one had mentioned the subject, Breckenridge told the other deputies that the Sheriff may have to put him on administrative leave because he was not talking to investigators. In addition, Breckenridge appeared to be sympathetic to Pickens, commenting that Pickens' financial difficulties were probably the reason he was involved in the drug deal.

At trial, defendant was represented by attorney William A. Kimbrough, a former United States Attorney with many years of experience as a criminal defense attorney. Mr. Kimbrough presented an aggressive defense on behalf of his client. Through cross-examination of government witnesses, presentation of defense evidence and argument, trial counsel portrayed Breckenridge as an honest, hardworking law enforcement officer who was the victim of Pickens' and Jones' plea bargains with the government. Numerous character witnesses were called to testify on Breckenridge's behalf. Some of those witnesses also testified that key government witnesses, such as Pickens and Treadwell, had bad reputations for truth and veracity.

Through the testimony of MCSD deputies and other law enforcement agents who worked with Breckenridge, the defense countered the government's evidence that Breckenridge protected drug dealers in the Uniontown area. Deputies testified that Breckenridge instructed them to stop and search Cedric Jones if they got the chance and that Breckenridge never prevented them from patrolling particular areas or from investigating anyone.

Defense counsel offered evidence of innocent explanations for some of the key pieces of corroboration relied upon by the government. For example, Phillip Maddox was called as a defense witness to explain the $3,000 withdrawal. Maddox testified that he was helping Breckenridge with his plan to purchase a jet ski using Maddox's father's employee discount and needed money in advance from

Breckenridge to cover the check he would have to write. To counter the government's suggestion that Breckenridge had assigned himself to the Sweetwater area on the date of the marijuana deal so that he could meet up with Pickens, defense counsel presented evidence that the sheriff had required deputies to be on duty at the Sweetwater ballpark and that other MCSD manpower was needed in Faunsdale at the balloon festival.

Despite defense counsel's efforts, some of the most damaging evidence against Breckenridge was his own testimony, specifically, implausible explanations for inculpatory evidence presented by the government. For instance, Breckenridge claimed that Pickens arranged the Burger King meeting with Jones and did not tell him why they were going. According to Breckenridge, he overheard Pickens tell Jones that Breckenridge was the man who would look out for him. Pickens then introduced the two, and Breckenridge sat down with Jones and Pickens. Breckenridge denied that there was any discussion of payoffs. Breckenridge testified that when he and Pickens got into the car, he told Pickens he would not put up with whatever Pickens was up to. Pickens apologized and said it would not happen again. Not only did Breckenridge overlook a bribery attempt, he subsequently developed a relationship with the drug dealer who had attempted to bribe him.

Breckenridge's explanation of his subsequent contacts with Cedric Jones were less than convincing. Breckenridge testified that some of the communications between him and Jones, including the

meeting at the water tower, were related to his purchase of a used car stereo amplifier for $150 from Jones. According to Breckenridge, the amplifier had burned out after he purchased it, and the meeting at the water tower was to discuss the matter. Breckenridge testified that Jones had expected Breckenridge to bring the amp to their meeting place but that Breckenridge had given the amp to a friend to fix. What Breckenridge's testimony did not explain was why a law enforcement officer was conducting a personal business transaction with a known drug dealer who had attempted to bribe him or why a clandestine meeting was necessary to discuss a used car stereo part that no longer worked.

Breckenridge implied that some of the telephone contacts between him and Jones were due to the fact that Jones was his informant, providing assistance in locating stolen four-wheelers and information about drug dealers. This might be a logical explanation if there were evidence that Jones had a reason, other than Breckenridge's complicity in his drug dealings, to provide information. But there was no reason offered as to why Jones would choose to be an informant for Breckenridge.

Breckenridge also testified the telephone contacts between him and Jones were actually significantly fewer than the records indicated because of problems with pager signals in some parts of the county. Breckenridge testified that when paging a person it was his custom to dial the number two or three times to be sure the page went through. As the government points out, however, the importance of

this evidence is not the total number of contacts, but the fact that there was contact at all between the two.

Finally, Breckenridge offered a weak explanation for his withdrawal of money coinciding with the marijuana deal for which Pickens claimed Breckenridge put up $4,000. Breckenridge did not explain the $1,000 withdrawal but he did have an explanation for the $3,000 and subsequent deposit. He testified that he planned to use the $3,000 to purchase a jet ski but changed his mind and put the money back after Pickens was arrested. The jet ski explanation was rather convoluted. Breckenridge testified that he expected to sell his jet ski for $4,000 then use the proceeds from the sale plus $3,000 cash to purchase a new jet ski. Breckenridge had negotiated a price with a jet ski dealer in Tuscaloosa. Phillip Maddox, a friend of Breckenridge's, testified that he was going to help Breckenridge purchase a jet ski. If Breckenridge could not get the jet ski in Tuscaloosa, Maddox was going to help him purchase one in Columbiana where Maddox's father's worked for a company that sold jet skis. Maddox was going to pretend to buy the jet ski so that he could taken advantage of his father's employee discount. The problem with these explanations is that Breckenridge also testified that his jet ski did not sell. Since $3,000 was not sufficient to purchase the new jet ski and Breckenridge apparently had no expectation of raising the balance of the purchase price, why was it necessary to withdraw the $3,000?

After many days of trial involving numerous witnesses for both the prosecution and the defense, Breckenridge was convicted of three counts--

conspiracy to possess with intent to distribute crack cocaine, conspiracy to possess with intent to distribute marijuana, and possession of marijuana with intent to distribute based on Pickens' undercover purchase.

C. Sentencing

On December 11, 1997, Breckenridge was sentenced to a life term of imprisonment for the crack conspiracy conviction, 7 years for the marijuana conspiracy conviction and 5 years for the possession with intent to distribute conviction.

D. Motion for New Trial

After trial, petitioner replaced Mr. Kimbrough with new counsel, attorney Thomas Thompkins. Shortly before sentencing, Thompkins filed a motion for new trial (MFNT) on petitioner's behalf, which was not ruled on prior to sentencing. In January 1998, Thompkins filed an amended motion for new trial. Petitioner's amended motion for new trial was based on some thirty items of allegedly newly discovered evidence. About half of these items related to the testimony of Robert Pickens, the remainder related to various pieces of allegedly newly-discovered exculpatory evidence, allegations of *Brady* violations, and prosecutorial misconduct. In a lengthy order, this Court denied the motion for new trial without an evidentiary hearing, concluding that none of the issues raised in the motion entitled petitioner to a new trial.

E. Appeal

Petitioner appealed his conviction and sentence and raised the following issues on appeal: sufficiency of the evidence, denial of the motion for new trial and sentencing issues.[6] The appellate court rejected all of petitioner's arguments and affirmed both the conviction and the sentence. On March 3, 2003, the United States Supreme Court denied Breckenridge's petition for writ of certiorari. The instant § 2255 motion was filed on March 1, 2004.

II. Issues Presented

Petitioner contends he is entitled to relief under § 2255 because both trial counsel and MFNT counsel provided constitutionally ineffective assistance at various stages of the proceedings. Petitioner's has categorized his claims as follows:

> I. Ineffective assistance of trial and MFNT Counsel
>
> > A. Failure to file a timely motion for a new trial
> >
> > B. Failure to object to Brady and Jencks Act violations
> >
> > C. Failure of trial counsel to adequately investigate/present evidence/cross examine witnesses

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[6] From the records currently available, it appears that attorney Greg Hughes represented defendant on appeal.

D. Failure of trial counsel to discredit Pickens and to bolster petitioner's trial testimony.

E. Failure of MFNT counsel to raise ineffective assistance of trial counsel in motion for new trial

II. Ineffective assistance of trial and MFNT Counsel for failure to preserve *Apprendi* issues for appellate review.

III. Ineffective assistance of counsel for failure to challenge a constitutionally defective indictment.

Below, the Court will discuss the law applicable to § 2255 motions, in general, and to ineffective assistance of counsel claims, in particular. Then, the Court will apply that law to petitioner's claims. To avoid redundancy, the Court will first address petitioner's overlapping evidentiary-based ineffective assistance claims[7] [Claims I (C) through (E)] by the categories of evidence to which those claims relate. Next, the Court will address the remainder of petitioner's Category I claims-trial counsel's refusal of the family's offer to hire cocounsel; admissions of ineffective assistance by trial counsel and MFNT counsel; a generalized failure to investigate claim; failure to file a timely motion for new trial, failure to

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[7] By evidentiary claims, the Court refers to claims that relate to the presentation of specific evidence or the failure to present specific evidence, whether due to inadequate investigation or other reasons, at trial or in the motion for new trial.

object to Brady and Jencks Act violations and failure to raise ineffective assistance claims in the MFNT. Finally, the Court will address petitioner's ineffective assistance claims related to counsel's failure to preserve *Apprendi* issues and counsel's failure to object to the allegedly defective indictment.

III. Applicable Section 2255 Law

A. In General

Habeas relief is an extraordinary remedy which "may not do service for a [ ] [direct] appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). A defendant who has waived or exhausted his right to appeal is presumed to stand "fairly and finally convicted." *Id.* at 164. Unless a claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained extremely limited. *Addonizio v. United States*, 442 U.S. 178, 185 (1979). In general, claims not raised on direct appeal may not be considered on collateral attack. A petitioner can, however, overcome his procedural default of claims not raised on direct appeal. The burden a petitioner must meet differs, depending upon the type of claim he raises. First, "nonconstitutional claims can be raised on collateral review only when the alleged error constitutes a fundamental defect which inherently results in the miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998) (citations and internal quotations omitted). A petitioner's burden with regard to constitutional claims not presented on direct appeal is slightly less stringent.

Constitutional claims may be considered if the petitioner can "show cause excusing his failure to raise the issues previously and actual prejudice resulting from the errors." *Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir. 1990). One way a petitioner may overcome a procedural default of claims not raised on direct appeal, and the path that petitioner has undertaken here, is by attributing the failure to raise those claims to constitutionally ineffective assistance of counsel. *Cross*, 893 F.2d at 1290.

B. Ineffective Assistance of Counsel

To establish that counsel's performance was so deficient as to violate petitioner's right to counsel guaranteed by the Sixth Amendment, petitioner "must show both incompetence and prejudice: (1) [P]etitioner must show that counsel's representation fell below an objective standard of reasonableness and (2) [P]etitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Chandler v. United States*, 218 F.3d 1305, 1312-13 (11th Cir. 2000) (en banc) (internal quotations and citations omitted).

Evaluation of the first prong of an ineffective assistance claim, the reasonableness of counsel's performance, is guided by the principles set forth by the Eleventh Circuit in *Chandler*. First, the standard is *reasonableness* under the prevailing norms of the legal profession. *Id.* at 1313. The question is not whether counsel did what was possible, or even what was prudent but whether he did what was "constitutionally

compelled." *Id.* The burden of persuasion is on the petitioner to prove by a preponderance of competent evidence that counsel's performance was unreasonable. *Id.* Review of counsel's performance must be highly deferential, and there is a "strong presumption" of reasonableness. *Id.* at 1314. That presumption is even stronger if petitioner was represented by experienced trial counsel. *Id.* at 1315. Nothing looks the same in hindsight; therefore, the Court must evaluate the reasonableness of counsel's performance from counsel's perspective at trial. *Id.* at 1316. No absolute rules dictate what is reasonable. *Id.* at 1317. Hence, counsel has no absolute duty to investigate particular facts or a certain line of defense. *Id.*

Even when an attorney is shown to have performed unreasonably in his representation of a defendant, it is just as likely as not that his error was harmless. *Johnson v. Alabama,* 256 F.3d 1156, 1177 (11th Cir. 2001). Therefore, a petitioner has a difficult burden to prove the prejudice prong of his ineffective assistance of counsel claims. *Id.* As noted, prejudice requires proof that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington,* 466 U.S. at 694). A "reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings.'" *Id.* It is not enough to show that the error had "some conceivable effect;" rather, the error must be so egregious as to render the trial unfair and the verdict suspect. *Id.*

C. Evidentiary Hearing

An evidentiary hearing is required with respect to petitioner's § 2255 claims "unless the motion and the files and records of the case conclusively show that the [petitioner] is entitled to no relief." 28 U.S.C. § 2255. "Notwithstanding this legislative mandate, it is well settled that a petitioner does not establish his right to a hearing by the simple expedient of filing a petition." *Vick v. United States*, 730 F.2d 707, 708 (11th Cir.1984). No hearing is required where petitioner has asserted claims that are patently frivolous, claims that amount to nothing more than unsupported generalizations or claims that are affirmatively contradicted by the record. *Id.*

IV. Ineffective Assistance of Counsel/Evidentiary Claims

A. Introduction

If the probability of success on a § 2255 motion were measured by the number of claims raised, then the probability in this case would be quite high. It is, however, the quality of those claims, not the quantity, that determines the outcome. Most of the 51 ineffective assistance claims asserted by petitioner relate to counsel's failure to investigate and to present certain evidence at trial or in a motion for new trial. When those claims are considered in the context of all the evidence presented, it is quite clear that petitioner received the representation of counsel guaranteed to him by the Sixth Amendment.

B. Robert Pickens

Obviously, the testimony of Robert Pickens, a codefendant who admitted to being petitioner's partner in crime, was important to the government's case. The majority of petitioner's ineffective assistance claims arise from counsel's failure to investigate or to present at trial or in the motion for new trial evidence that tended either to contradict or to impeach Pickens' testimony. Numerous though these claims are, they can be broken down into the following categories: (1) Pickens' testimony about bribes paid by Edward Lofton; (2) Pickens' testimony regarding a marijuana field maintained by petitioner; (3) Pickens' testimony about petitioner's financial situation; (4) Pickens' testimony related to the marijuana transaction with the undercover agent; (5) post-arrest statements by Pickens to fellow inmate Lufories Eaton denying petitioner's involvement in the marijuana transaction; (6) other bad acts in Pickens' past; and (7) false testimony by Pickens.

1. Edward Lofton

Edward Lofton was a Marengo County drug dealer. Pickens testified that about four times over an 11-month period Breckenridge gave Pickens crack cocaine to take to Lofton. Lofton gave Pickens money to take back to Breckenridge. Pickens acted as the go-between because Lofton did not trust Breckenridge due to his race. Pickens and Lofton are black. Breckenridge is white.

Pickens also testified that he and Breckenridge once got Lofton out of trouble when Lofton was

arrested for drug dealing in nearby Clarke County. When Lofton was arrested, Pickens, with Breckenridge's okay, went to see Clarke County Sheriff Jack Day. Pickens told Day that they needed Day's help getting Lofton out of jail because Lofton was their informant. Day refused to help except for arranging for Lofton's bond to be set the following day. Pickens testified that he Breckenridge made two additional attempts to get the Clarke County case against Lofton dropped. First, met with a Robert Heinz or Hinds, who worked narcotics, explained to him that Lofton was their informant and asked for help. Heinz refused. Next, they met with Irish Clayton, the Clarke County sheriff's deputy who had arrested Lofton. This meeting took place at a Ryan's Steakhouse. Breckenridge told Clayton that Lofton was making a lot of drug cases for them in Marengo County as an informant and asked if Clayton could help get the Clarke County case dismissed. According to Pickens, Breckenridge slipped Clayton $500 as they left the meeting. Sometime thereafter, Clayton came to a club near the Clarke County/Marengo County line where Pickens was working security. They took Clayton's patrol car down a secluded road, pulled up the back seat and removed crack cocaine.

Lofton did not testify at trial. After the trial, petitioner's MFNT counsel and a defense investigator interviewed Lofton. In that interview, Lofton stated that he previously had been summoned to the United States Attorney's Office where he was interviewed by AUSA Gloria Bedwell and denied knowledge of any illegal activities on the part of Breckenridge. In conjunction with the interview by the defense, Lofton

provided a post-trial affidavit in which he essentially denied all of Pickens' testimony against him. This affidavit was submitted in conjunction with the motion for new trial. After the motion for new trial was denied, Lofton was interviewed twice more by MFNT counsel and/or petitioner's investigator. In both interviews, Lofton refused to sign any additional affidavits. In the third interview, Lofton admitted that he was dealing crack on behalf of Robert Pickens when he was arrested in Clarke County, Alabama but denied that petitioner was involved in any wrongdoing. Lofton's attorney was also interviewed by petitioner's investigator who indicated to the investigator that Lofton had an "arrangement" with the government.

Irish Clayton did not testify at trial either. In response to the motion for new trial, the government filed a transcript of Clayton's grand jury testimony. Clayton's testimony corroborates Pickens' testimony that he and Breckenridge met with Clayton in an attempt to assist Lofton. As the Court noted in its order denying the motion for new trial, "[t]he primary difference between Clayton's version of events and Pickins' [sic] version is that Clayton denies any wrongdoing on his own part." [Doc. 1388, p. 9.]

Petitioner alleges that trial counsel provided ineffective assistance with regard to Pickens' testimony about Lofton because he: (1) failed to call Lofton as a witness to deny paying money to Breckenridge and to deny knowledge of wrongdoing on Breckenridge's part [Claim IC(2)(b)]; (2) failed to call as Irish Clayton as a witness to contradict Pickens' testimony about the meeting at Ryan's steak house [Claim I(C)(2)(c)]; (3)

failed to "establish that Pickens' testimony regarding the meeting at Ryan's Steakhouse was inconsistent" with Clayton's grand jury testimony [Claim I(D)(15)]; (4) failed to introduce a copy of Lofton's bond from Clarke County signed by Jack Day and by Pickens [Claim I(D)(20)].[8]

As to each of these alleged errors, counsel's acts or omissions were neither unreasonable nor prejudicial. The post-trial interviews with Lofton reflect the likely futility of calling him as a witness. Those interviews indicate that he is not necessarily a cooperative or reliable witness. Furthermore, the government had little, if any, corroboration for Pickens' testimony regarding Lofton. The government did not present testimony from any of the law enforcement officers from Clarke County whom Pickens and Breckenridge allegedly approached about helping Lofton. It was certainly reasonable for trial counsel to let the weakness in the government's case speak for itself, rather than risk damaging his own case with an unreliable witness. Moreover, it is not likely that Lofton's testimony on petitioner's behalf would have made a difference in the outcome of the trial. The arrangement between Lofton and Breckenridge was merely a small part of the government's case against petitioner. The government presented evidence that Breckenridge had engaged in, or attempted to engage, in similar wrongdoing with other drug dealers.

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[8] Petitioner also claims that MFNT counsel rendered constitutionally ineffective assistance because he failed to raise these ineffective assistance of trial counsel claims in the motion for new trial [Claim I(E)(1)].

Failure to call Irish Clayton as a witness also was neither unreasonable nor prejudicial. Assuming Clayton would have testified consistently with his grand jury testimony, his testimony would have confirmed most of Pickens testimony, except the part about Clayton accepting a bribe from Breckenridge. It is certainly not unreasonable for counsel not to present testimony that is as damaging as it is helpful, nor is there a reasonable likelihood that such testimony would have made a difference in the outcome of the trial.

Petitioner's additional claim about Pickens' Lofton/Clayton testimony is equally meritless. Petitioner asserts that counsel should have, in some unspecified way, established that Clayton's grand jury testimony was inconsistent with Pickens' trial testimony. Since Clayton's grand jury testimony could not have been used to impeach Pickens at trial, the only way counsel could have established the inconsistency would have been to call Clayton as a witness. As discussed immediately above, omitting Clayton as a defense witness was neither unreasonable nor prejudicial.

Finally, petitioner's ineffective assistance based on counsel's failed to introduce a copy of Lofton's bond is merely conclusory. Petitioner does not explain why the failure to do so was unreasonable or prejudicial.[9]

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[9] This issue was raised in petitioner's motion for new trial. In this order denying petitioner's motion, the Court found that the bond was neither exculpatory nor impeaching because it merely reflected that Sheriff Day approved the bond and Pickens signed it. (Doc. p. 7.) This was consistent with Pickens testimony.

2. The Marijuana Field

Pickens testified at trial that petitioner maintained a marijuana field on a piece of land owned by Daniel Barkley, petitioner's brother-in-law. A sidebar occurred during Pickens' testimony about this issue, and in open court with the jury present petitioner's trial counsel asked Barkley, who was sitting in the audience, to leave the courtroom because he had become a potential witness. In support of the § 2255 motion, Barkley has filed an affidavit in which he states that he would have testified that petitioner did not grown marijuana on his property.

Petitioner asserts that counsel's failure to call Barkley amounted to ineffective assistance, in part because he asked Barkley to leave the courtroom in open court during Pickens testimony. [Claim I(C)(2)(a).] Trial counsel's failure to call Barkley was not unreasonable. Barkley's testimony would have added little to the defense. Since Barkley was related to the petitioner and was allegedly allowing illegal activity on his property, his testimony could have easily been impeached by the government. Petitioner claims he was prejudiced because of the manner in which Barkley's status as a potential witness was called to the jury's attention. In his affidavit, Barkley asserts that the jury was left with the false impression that Pickens' statements about the marijuana fields were true. The trial was a lengthy one, involving many witnesses and potential witnesses. Pickens testimony, and Barkley's exit, came relatively early in the trial. It is likely that the episode had much, if any significance, by the time the jury deliberated. More importantly, even if

the jury made some improper inference from Barkley's failure to testify, there was no prejudice because this issue relates only to a *very* minor part of the government's case.

3. Breckenridge's Financial Situation

To counter any inference from Pickens' testimony that plaintiff took bribes to support an extravagant life style, petitioner contends counsel should have put on evidence, *e.g.*, bank records, financial documents, income tax returns and testimony from petitioner's wife and father-in-law, to show that petitioner and his wife had sufficient legitimate income to support their lifestyle. [Claims I(C)(2)(f) & (g) & I(D)(6)(a), (b) & (c).] Petitioner testified as to almost all of this information--his salary, his wife's salary as a teacher, the amount of rent the couple paid for their duplex, the amount of the lease payment on his truck and the fact that his father-in-law had paid for his wife's car and the couple's jet skis-and the government had no evidence to dispute this testimony. Perhaps additional evidence would have strengthened petitioner's position at trial, but given the magnitude of the government's evidence against petitioner there is not a reasonable probability that the omission of this evidence affected the outcome of the trial.

4. Marijuana Deal with Undercover Agent

Petitioner asserts that counsel should have introduced several pieces of evidence to impeach

or contradict Pickens' testimony about petitioner's involvement in the undercover marijuana purchase that led to Pickens' arrest. First, petitioner points out that counsel failed to call as a witness Buster Glover, the drug dealer who set up the marijuana purchase for Pickens. [Claim I(C)(2)(e)] Petitioner has submitted Glover's affidavit in which Glover states that he has never met Breckenridge. But the government never asserted that Glover and Breckenridge knew each other. Rather, Pickens testified that he was the one who contacted and dealt with Glover. Counsel's failure to call Glover was not unreasonable[10] and petitioner suffered no prejudice because Glover's proposed testimony relates to a fact not in dispute.

Petitioner contends that trial counsel should have called Laverne Gamble, an attendant at the Corner Store Texaco in Linden where Pickens testified he stopped for gas around 5:30 p.m. on his way to the purchase the marijuana. [Claim I(C)(2)(j).][11] Gamble has provided an affidavit in which she states that she is "absolutely certain that Robert Pickens did not come to The Corner Store to purchase gas or for any other purpose on the day that he was arrested." (Pet.'s Ex. M.) Counsel's failure to call Gamble as a witness was not unreasonable because her testimony would have had only marginal value. Where, or even whether, Pickens stopped for gas on the way to the drug deal is

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[10] In fact, counsel pointed out in his closing statement that Breckenridge had no contact with Glover.

[11] Petitioner also claims that MFNT counsel rendered constitutional ineffective assistance because he failed to raise this ineffective assistance of trial counsel claim in the MFNT. [Claim I(E)(2).]

a minor detail. Petitioner was not prejudiced by counsel's failure to call Gamble as a witness.

As further evidence that he was at the ballpark in Sweetwater on legitimate business on the evening the transaction between Pickens and the undercover agent took place, petitioner asserts that counsel should have called as witnesses Darlene Jones and John Broussard, both of whom have provided affidavits in support of the § 2255 motion. [Claim I(C)(2)(m).] In her affidavit, Jones states that she saw petitioner at the ballpark when she arrived at 4:30 p.m. and again when she left after 7:30 p.m. and that the sheriff required deputies to be present at the ball field in Sweetwater for security purposes. Broussard, the owner of a local restaurant Faunsdale, would have confirmed that he had requested deputies to assist with the balloon festival in Faunsdale on the date of the undercover buy. The import of the testimony would have been that Breckenridge was at the ballpark in Sweetwater and that he had a legitimate reason to be there because other deputies were in Faunsdale. Neither of those facts were disputed. Jones' testimony that she saw Breckenridge when she arrived and when she left is intended, perhaps, to rule out the possibility that Breckenridge left the ballpark, as planned, drove 10 to 15 minutes to the Texaco where he expected to meet Pickens after Pickens made the buy. However, that the witness saw Breckenridge at 4:30 and at 7:30 does not rule out the possibility that he left and came back somewhere in between. Counsel did not act unreasonably by failing to present witnesses who could testify only to facts not in dispute (*i.e.*, why Breckenridge was at the ballpark) or to facts that don't

actually contradict the evidence they are intended to disprove (*i.e.*, that Breckenridge planned to meet Pickens at the Texaco). Petitioner was not prejudiced by counsel's failure to call these witnesses because the testimony would not have been helpful to impeach or contradict Pickens.

5. Agent Conner

According to petitioner, his trial attorney should have established that ABI Agent Conner, the undercover agent involved in the marijuana transaction, dealt only with Pickens [Claim I(D)(21)]. That fact was evident from Conner's testimony, and there was no suggestion that Breckenridge did have any dealings with Conner. Since the bell was never rung, there was no need to unring it. Counsel's failure to negate a point that had never been proved, was not unreasonable and did not prejudice the petitioner.

6. Legitimate Purpose for $3000 Withdrawal

Pickens testified that he and Breckenridge put up $4,000 each for the ill-fated marijuana purchase arranged through Glover. At trial, the government presented evidence that Breckenridge withdrew $3,000 from a savings account on May 15, 1997, one days before the undercover buy took place and $1,000 from another savings account on the day of Pickens arrest. Breckenridge testified at trial that he had a legitimate reason for withdrawing $3,000, that is, that he had planned to purchase a jet ski. In his § 2255 motion, petitioner asserts that trial counsel rendered

ineffective assistance by failing to present evidence to support this testimony. To this end, petitioner contends that counsel should have presented the testimony of his father-in-law [Claim I(C)(2)(f)], his wife [Claim I(C)(2)(g)], a bank branch manager [Claim I(C)(13)] and a friend [Claim I(C)(13)].

Petitioner's father-in-law, William Braswell, would have testified that he had purchased jet skis for his daughter and son-in-law approximately two years before petitioner's arrest. Those jet skis cost approximately $6,000 each, and Braswell has provided the bill of sale and cancelled check confirming that he made the purchase. Braswell would also have testified that more than a year after the purchase (which was less than a year before petitioner's arrest), Breckenridge paid Braswell approximately $5,000 for his jet ski because he intended to trade it for a faster one.[12] Breckenridge's wife, Wendy, would also have that her father purchased the jet skis.

Phillip Eugene Maddox has provided an affidavit in which he expands on his trial testimony about the jet ski. According to Maddox's affidavit, the arrangement was for Breckenridge to trade in his jet ski toward the cost of the new jet ski. They expected the trade-in value of the used jet ski to be around $2,500. The jet ski Breckenridge planned to purchase had a retail price of $6,500 but would cost only $5,100 with Maddox's discount. Since they were using his father's discount, Maddox was to write the check and

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[12] According to Braswell's affidavit, Breckenridge put the money together using approximately $3,000 in overtime pay and a $1,500 loan.

Breckenridge was to provide the money to cover the check before the check was written.

The branch manager, Diane Qualls, would have testified that Breckenridge withdrew $3,000 on May 15, 1997 and deposited $3,000 on May 19, 1997. When he made the $3,000 deposit, Breckenridge told Qualls that he had withdrawn the money to buy a jet ski but had changed his mind and was redepositing the money he had withdrawn.

Counsel's failure to present this evidence to corroborate the jet ski story was neither unreasonable nor prejudicial.[13] First, the current version of the jet ski plan contradicts petitioner's testimony. Petitioner testified that he was planning to sell his jet ski for $4,000 in order to purchase a new one. He made no mention of trade-in plans. Second, the current version makes no sense, from a financial standpoint. Petitioner would have paid a total of $8,000 and ended up with a jet ski with a retail value of $6,500.[14] The affidavits of petitioner's father-in-law and wife portray the couple's financial situation as a healthy one-a two-income couple with no debt and minimal expenses who were conscientiously saving to purchase a house. Paying a

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[13] As to Maddox, counsel's performance was not unreasonable because counsel did call him as a defense witness at trial. Petitioner does not assert that counsel should have known about the additional information now provided in Maddox's affidavit.

[14] Breckenridge paid his father-in-law $5,000 for the jet ski, for which he was only going to get $2,500 as trade-in value, and would have added $3,000 of his own savings.

total of $8,000 in cash and ending up with a jet ski worth $6,500 is not a financially responsible act.

Finally, Breckenridge's self-serving explanation to the branch manager about the deposit was hearsay and, therefore, was not admissible in the first place. Even if it were, it could have been easily discredited by the government as a cover story, made up by petitioner to cover his tracks after Pickens' arrest.

7. Prior Inconsistent Statements

Petitioner asserts that trial counsel could have impeached Pickens with statements Pickens made to Lufories Eaton while Pickens and Eaton were incarcerated in the Baldwin County Jail. [Claim I(C)(2)(h).] Eaton has provided an affidavit, dated January 19, 1999, in which he states that he spend more than a year in the Baldwin County Jail because he was "brought back" from "Federal Prison" to testify as a government witness in several of the Uniontown trials.[15]

Eaton's affidavit states, in relevant part:

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[15] Eaton did not testify in Uniontown I, the trial in which Breckenridge was tried.

> While incarcerated in the Baldwin County [Jail] I have spoken on a number of occasions with Robert Pickens,. . . Concerning the 10 pounds of marijuana that Pickens purchased, when Pickens was arrested, Pickens told me that there was nobody in that deal except Pickens and Ced Jones. Pickens said that Ced Jones got him to say that Breckenridge was involved but that was not true.
>
> Pickens also told me that he purchased the [m]arijuana so that he could trade it to Ced Jones for crack cocaine which Pickens traded to women for sexual favors. Pickens told me that he had never trusted Breckenridge and that Breckenridge did not know what Pickens was doing.
>
> Pickens also told me that [Agent] Tony Calderero had told him (Pickens) that he (Pickens) could either testify against Breckenridge or he (Pickens) could do all the prison time.

Pet.'s Ex. K.

Keeping in mind that unless the records *conclusively* show that petitioner is not entitled to relief, the Court cannot determine on the current pleadings whether counsel's failure to uncover Eaton as a

potential witness prior to trial was reasonable.[16] However, the Court can, and does, conclude that Eaton's absence as a witness was not prejudicial. Not having heard Eaton testify, the Court will assume, *arguendo*, first, that Eaton would have testified at trial as to statements in his affidavit and, second, that such testimony probably would have caused the jury to consider Pickens' testimony more cautiously. That the jury would have viewed Pickens' testimony more skeptically, however, does not make it likely that it would have disbelieved his testimony entirely[17] or that it would have acquitted petitioner. While Pickens was certainly an important witness, the government's case did not rise and fall on the strength of his testimony. Pickens' testimony was corroborated by other witnesses and evidence, including a wiretap recording of petitioner arranging a meeting with Cedric Jones,

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[16] Exactly what type of investigation, if any, might have enabled counsel to locate and obtain information from Eaton is not clear. An inmate at the Baldwin County Jail who has no obvious connection to petitioner or to Pickens would not have been an obvious defense witness. Moreover, since nothing in Eaton's statement indicates that his conversations with Pickens took place prior to petitioner's trial, it is far from evident that Eaton's testimony would have been available at trial. These are the types of questions that would have to be resolved at an evidentiary hearing, if one were necessary.

[17] The statements Pickens allegedly made to Eaton appear to negate Breckenridge's involvement in the marijuana deal but not in the other wrongdoing about which Pickens testified. Also, Pickens statement that he "never trusted Breckenridge" tends to inculpate Breckenridge. Pickens' discussion of trust implies complicity. If Breckenridge were an honest law enforcement officer from whom Pickens had been hiding his nefarious dealings, there would be no expectation of trust.

numerous telephone and pager contacts between Breckenridge and Jones, Breckenridge's own inculpatory statements following Pickens' arrest and the testimony of Cedric Jones, the Prestons, Huriel Treadwell and Fritz Paul, among others.

8. Other Bad Acts

Petitioner contends that counsel rendered ineffective assistance because he failed to use numerous specific instances of bad conduct to discredit Pickens' testimony. Specifically, petitioner cites evidence that: (1) Pickens had an illegitimate child and was avoiding child support [Claims I(C)(2)(I) & I(C)(2)(a)]; (2) Pickens filed false income tax returns [Claim I(D)(1)]; (3) Pickens burned his own vehicle to obtain insurance proceeds and filed a false claim [Claims I(D)(2) &I(C)(2)(a)]; (4) Pickens paid someone at a lumberyard so that Pickens could steal lumber to build a deck [Claim I(D)(3)]; (5) marijuana was found in Pickens' locker at the MCSD that the ABI & DEA missed when they executed their search warrant [Claim I(D)(5)]. Counsel's failure to introduce extrinsic evidence regarding these events was neither unreasonable nor prejudicial because such evidence is inadmissible. *See* Fed. R. Evid. 608(b) (extrinsic evidence not admissible to prove specific instances of

conduct of a witness, other than conviction of a crime).[18]

9. False Testimony-The Triplets

Pickens testified that he became involved in illegal activity because he needed money when his wife was pregnant with the triplets. As one ground for the MFNT, petitioner's MFNT counsel asserted that newly discovered evidence demonstrated that this testimony was false because Pickens and his wife did not have triplets. In his § 2255 motion, petitioner argues that this issue should have been raised as in the MFNT as an ineffective assistance of trial counsel

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[18] According to Rule 608(b), counsel may, in the discretion of the court, inquire into specific instances of conduct on cross examination of the witness if the conduct is probative of the witnesses' character for truthfulness. Counsel did inquire about the existence of an illegitimate child, and Pickens denied it. Pursuant to the rule, extrinsic evidence was not admissible to contradict Pickens' denial. On cross examination, counsel might also have inquired about the false insurance claim and the lumber theft, both of which are arguably probative of truthfulness. That counsel did not cross examine on these points was not unreasonable, however. Inquiring into specific instances of conduct is a tenuous method of cross examination that can easily backfire. Since extrinsic evidence is not admissible to prove conduct denied by the witness, the jury may be left with the impression that counsel is making false accusations. Moreover, because inquiry is left to the discretion of the Court, there is no assurance that such cross examination would have been allowed

claim, not as a newly discovered evidence claim.[19] [Claim I(E)(4).] As discussed in the order denying the MFNT, it is arguable whether this evidence actually impeaches Pickens' testimony. Even if it did, it relates to such a minor point that it is not likely that this evidence would have produced an acquittal if a new trial were granted.[20] Furthermore, for reasons discussed *infra*, Part IX, MFNT counsel was not unreasonable for failure to raise an ineffective assistance of counsel claim in the motion for new trial.

10. False Testimony-Bo Diddley

Pickens testified at trial that he did not know a Uniontown drug dealer known as Bo Diddley and that he never went to Bo Diddley's house. In support of both his motion for new trial and the instant § 2255 motion, petitioner has submitted an affidavit from Leon Williams. Williams relates an incident in which he and Pickens went to Bo Diddley's house in Uniontown. The clear implication from Williams' affidavit is that Pickens went to Bo Diddley's to pick up bribe money. According to Williams, Pickens had a large amount of cash after he came out of Bo Diddley's

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[19] The Court denied the MFNT as to this claim, in part, because petitioner did not allege why this evidence, *i.e.* that Pickens did not have triplets, could not have been discovered earlier, a necessary element of proof in a motion for new trial based on newly discovered evidence.

[20] As the Court pointed out in the order denying motion for new trial, evidence that Pickens and his wife did not have triplets does not directly impeach his testimony that she was pregnant with triplets. As such, it has little relevance. If it did directly impeach Pickens, it did not entitle petitioner to a new trial

house, although he'd been too broke to buy beer before he went in. The affidavit also relates Williams' general knowledge about other illegal activities by Pickens.

Petitioner contends that trial counsel rendered ineffective assistance because he failed to call Williams to testify at trial. [Claim I(C)(2)(K).][21] As discussed above, *supra* p. 24, impeachment by extrinsic evidence of prior bad conduct is not admissible. Therefore, most of Williams' testimony would have been inadmissible pursuant to Rule 608(b). While Rule 608(b) does not apply to Williams' testimony that Pickens knew Bo Diddley, such evidence amounts to impeachment on an immaterial point. Trial counsel was not unreasonable for failing to call Williams to testify, and petitioner suffered no prejudice.

Petitioner also claims that, in some unspecified manner, MFNT counsel rendered ineffective assistance regarding the Bo Diddley/Leon Williams evidence. Apparently, petitioner believes that MFNT counsel was ineffective because he failed to persuade the Court that the evidence had some relevance other than impeachment. [Claim I(E)(3).] Counsel's action was not unreasonable merely because it was unsuccessful. This evidence did not entitle petitioner to a new trial, and MFNT counsel could not have persuaded the Court that it did. MFNT counsel did not render constitutionally ineffective assistance.

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[21] Petitioner also asserts that MFNT counsel rendered constitutionally ineffective assistance for failing to raise this ineffective assistance of trial counsel claim in the MFNT. [Claim I(E)(6).]

C. Huriel "Billy" Treadwell.

Huriel "Billy" Treadwell was a Marengo County drug dealer who testified against Breckenridge at trial. At the time of his testimony Treadwell was serving a state sentence for dealing crack cocaine. The sentence was the result of an arrest by Pickens and Breckenridge. According to Treadwell, he was out on bond for three years before he was sentenced. Treadwell testified that about a year after his arrest, he "met Mr. Sonny Breckenridge up there and he asked me what I was doing. I told him nothing. And then he asked me if I wanted to sell some. I told him yeah, I would sell some. He said go to selling, just pay him some money. So I started." (Tr. p. 1455.) According to Treadwell, he began paying Breckenridge $500, then $1,000 per month. Treadwell stated that Breckenridge and/or Pickens would pick up the money from him. When Treadwell was finally sentenced, it was arranged that he would serve his time in the Marengo County jail, rather than in a state prison.

Petitioner claims that counsel rendered ineffective assistance because he failed obtain information through investigation that would have "destroyed" Treadwell's credibility as a witness. [Claim I(C)(2)(n).] A portion of the material cited by petitioner--an initial statement to investigators in which he denied giving protection money to Breckenridge-was actually used by trial counsel in his cross examination of Treadwell. The remainder of the Treadwell impeachment material relates to a post-trial statement given by Treadwell to petitioner's investigator. Petitioner asserts that Treadwell could

have been impeached by information gleaned through this statement--his failure to describe Breckenridge's uniform in detail, his inaccurate description of Breckenridge's car and his claim that he saw Breckenridge take money out of his mailbox at 2:00 a.m.

Trial counsel was not unreasonable for failing to obtain a statement from Treadwell because counsel had sufficient impeachment evidence. First, there were Treadwell's prior inconsistent statements about Breckenridge. Using these statements, counsel elicited testimony from Treadwell demonstrating that Treadwell first denied any payoffs to Breckenridge. As cross-examination made clear, it was only after Federal authorities had Breckenridge transferred from Marengo County to the Mobile County Jail, where he spent a few days sleeping on the floor, that Treadwell gave a statement implicating Breckenridge. Counsel also brought out evidence on cross-examination that brought into question Treadwell's mental acumen by pointing out that Treadwell was on "a lot of medication" including medication for "[s]ugar, arthritis and [blood] pressure," and he suffered from "[h]eart, chest and lung[ ] [problems]." " (Tr. p. 1464.)

Not only were counsel's actions reasonable, failure to obtain and use the impeachment material proffered in support of the § 2255 motion did not result in prejudice to the petitioner. Evidence that Treadwell could not accurately describe a uniform or a car does not detract from credibility because the uniform and the car have absolutely no bearing on his identification of Breckenridge. While those details might be

important where a witness is describing a single incident involving a person he did not know, Treadwell knew Breckenridge and testified that he took money from him on several occasions. Furthermore, whether or not Treadwell had a good view of the two mailbox pickups has little impeachment value in light of the face-to-face meetings Treadwell testified about. Finally, the jury had sufficient information about Treadwell's ability (or inability) to identify and recall accurately. Treadwell's testimony on direct was somewhat vague. He was not specific about time, *i.e.* "about three years" between arrest and sentencing, went back to selling "a year and something" after arrest. He did not explain very clearly how it came about that Breckenridge sent him back into the drug business. From Treadwell's testimony, it appears that Breckenridge just asked him out of the blue "if I wanted to sell some." (Tr. p. 1455.) The Court's confidence in the jury's verdict is not undermined by counsel's failure to obtain and use more impeachment material in his cross- examination of this witness.

D. Cedric Jones

1. Barrown Lankster & Darryl Harris

Petitioner alleges that trial counsel rendered constitutionally ineffective assistance because he failed to subpoena Marengo County District Attorney Barrown Lankster to rebut the testimony of Cedric Jones regarding Darryl Harris' sentence of probation. Jones testified that Breckenridge offered to have Pickens talk with the D.A. on behalf of Harris

and, in exchange, Jones paid Breckenridge $700. According to petitioner, Lankster would have testified that he never took payments from Breckenridge for anything illegal. That Breckenridge did not pay Lankster does nothing to negate Jones' testimony that Jones paid Breckenridge because Breckenridge promised that Pickens would intercede with Lankster on behalf of Harris. Trial counsel's failure to present Lankster's testimony in this regard was neither unreasonable nor prejudicial because the proffered testimony does not rebut Jones' testimony.

2. Pager Dead Zones

Petitioner asserts that counsel was constitutionally ineffective because he failed to present evidence from a pager company to corroborate Breckenridge's testimony about pager dead zones in the parts of the county. [Claim I(D)(7).] Breckenridge used the pager dead zones to explain why he made numerous calls to Cedric Jones. According to Breckenridge, he would enter a number two or three times to be sure a page would go through. Theoretically, the pager dead zone evidence might also account for some of Jones' 35 calls to Breckenridge. Whether Breckenridge called Cedric Jones 9 times or 27 and whether Jones called Breckenridge 12 times or 35 is beside the point. Pager dead zones do not explain why Marengo County's top drug enforcement officer was in regular contact with one of Marengo County's top drug dealers. Failure to present this evidence was neither unreasonable nor prejudicial.

3. Stereo Amplifier

Petitioner asserts that counsel rendered constitutionally ineffective assistance because he failed to introduce evidence to corroborate petitioner's claim that he had a legitimate reason for meeting with Cedric Jones, *i.e.*, petitioner had purchased a used car stereo amplifier from Jones. [Claim I(D)(12).] However, the corroborating evidence petitioner relies upon consists of affidavits that do nothing more establish the value of the amplifier Breckenridge claims to have purchased. Breckenridge testified that he purchased an amplifier worth $150, and counsel failed to present proof that the amplifier he claimed to have purchased was worth the amount he claimed to have paid. The part of Breckenridge's testimony that needed corroboration was not the amount he paid; rather, it was whether he purchased an amplifier at all. Even if the evidence somehow tended to establish that Breckenridge, in fact, purchased an amplifier from Cedric Jones, it would not have, as petitioner claims, "resolved, in the jury's mind, the truth of Petitioner's testimony." Many questions would still have remained: Why was Marengo County's top drug enforcement agents conducting a personal business transaction with one of the county's best-known drug dealers? Why did it require a clandestine meeting at the water tower? Why did they have so many contacts? Petitioner was not prejudiced, and counsel did not act unreasonably in failing to present evidence that would have, at best, corroborated a minor point.

4. Traffic Tickets

According to petitioner, counsel should have introduced into evidence two traffic tickets issued to Cedric Jones in 1996 by the Chief of Police of Thomaston, Alabama. [Claim I(D)(10).] Petitioner argues that the fact these tickets had not been "fixed" demonstrated that petitioner was not protecting Jones. Any number of explanations could exist for why traffic tickets had not been fixed, so the existence of the tickets alone is of little evidentiary value. Moreover, it could also be argued by the government that the existence of the tickets tends to disprove petitioner's testimony that Jones was his informant, since fixing tickets would be one way to reward an informant. Or, on the other hand, it could be argued that not causing the tickets to be fixed-minor violations-was part of the cover used to protect the nefarious relationship between Sonny Breckenridge and Cedric Jones. Counsel's failure to introduce this evidence was neither unreasonable nor prejudicial.

5. Bank Records

Petitioner argues that counsel should have disputed Cedric Jones testimony that he paid protection money to petitioner between the 1st and 3rd of the month by introducing evidence that petitioner made no corresponding deposits during that time period each month. [Claim I(D)(11).] Since one would not expect a law enforcement officer on the take to regularly deposit his illicit gains into the bank, counsel's failure to prove that no such deposits occurred was neither unreasonable nor prejudicial.

E. Miscellaneous Issues

1. Jewelry Store

On cross examination at trial, the government asked petitioner, ". . .[Y] also spent some of your money at the Gold Mine in Demopolis, didn't you?" (Tr. p. 2102.) Petitioner responded, "I recall buying myself a bracelet. . . And I bought my wife an engagement ring there . . . [b]ut I took out a loan, another loan from the bank to pay for it." *(Id.)* In his § 2255 motion, petitioner contends that counsel rendered ineffective assistance by failing to call the owner of the Gold Mine to verify that petitioner bought only a bracelet and an engagement ring at his jewelry store. [Claim I(C)(2)(d).][22] According to petitioner, the government's question regarding money spent at the Gold Mine created the impression that petitioner bought other items of jewelry at the store. It is not apparent to the Court how the government's question and the petitioner's response might have created the impression that petitioner bought any items at the Gold Mine other than the ones he testified about. Counsel's failure to call the store's owner to testify was not unreasonable and did not prejudice the petitioner.

2. Evidence Room

Petitioner alleges that counsel was constitutionally ineffective because he failed to subpoena records from the MCSD evidence room to

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[22] Petitioner also asserts that MFNT counsel rendered constitutionally ineffective assistance by failing to raise this ineffective assistance of trial counsel claim in the MFNT.

show that nothing was missing. [Claim I(D)(5).] The evidence at trial, from government and defense witnesses alike, portrayed an evidence room that was in complete and utter disarray. In this situation, the records would have been of little or no value. Counsel's failure to subpoena the records was not unreasonable and did not prejudice the petitioner.

3. Roger Davis

Petitioner argues that counsel rendered constitutionally ineffective assistance because he failed to call then-Sheriff Roger Davis as a witness on petitioner's behalf. [Claims I(C)(2)(l).] According to petitioner, Davis could have: (1) contradicted a portion of Pickens' testimony about Billy Treadwell; (2) testified as to Pickens bad character for truthfulness and specific instances of dishonesty by Pickens; (3) provided background evidence about Breckenridge; (4) explained why it would have been impossible for Breckenridge to be at Compton's Store on the evening of Pickens' arrest.

Only truly incompetent counsel would have called Roger Davis as a witness on behalf of his client. Testimony at trial indicated that Davis was under investigation by federal authorities. A reasonably competent attorney, even a marginally competent attorney, would have concluded that testimony by Davis was as likely to harm the defense as it was to help it. Since the jury already knew Davis was under investigation, they might not have looked upon his testimony favorably. Moreover, the government would have been likely to have some impeachment

ammunition due to its investigation of Davis.[23] Linking Breckenridge and Davis would have been a risky strategy, which counsel was wise to avoid.

4. Good Character

Petitioner argues that counsel rendered constitutionally ineffective assistance because he failed to call Sheriff Roger Davis, law enforcement officers from other counties and District Attorney Barrown Lankster to testify as to petitioner's good character. [Claims I(C)(2)(1), I(D)(8).] Trial counsel presented ample character evidence. At least seven defense witnesses testified as to petitioner's good character. Trial counsel did not act unreasonably in failing to tender more such testimony because his ability to present character witnesses was limited by Fed. R. Evid. 403 which allows a limit on the number of character witnesses who may testify at trial due to the cumulative nature of their testimony. Furthermore, petitioner was not prejudiced by the omission of the additional character evidence because there was sufficient evidence of good character.

VI. Ineffective Assistance/Trial Counsel's Refusal of Assistance

Petitioner asserts that trial counsel rendered constitutionally ineffective assistance of counsel because he refused offers made by petitioner's family to retain co-counsel and a private investigator to assist

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[23] On August 22, 1997, just before the conclusion of petitioner's trial, Davis was arrested on a federal indictment in this district charging him with extortion.

him with trial preparation. [Claim I(C)(1).] Petitioner makes no specific allegation as to why the refusal of assistance was either unreasonable or prejudicial. Consequently, this claim is nothing more than a conclusory allegation which is due to be denied summarily.[24]

VII. Admissions of Ineffective Assistance by Trial Counsel and MFNT Counsel

Petitioner's has presented affidavits from trial counsel and from MFNT counsel in which both set out things they should have done or should have done differently in their representation of petitioner. [Claims I(C)(17), (18) & (19).] Most, if not all, of these are the subject of specific claims that have been raised petitioner's § 2255 motion and addressed elsewhere in this order. That former counsel now "admit" their ineffectiveness has no bearing on the Court's evaluation of those claims. *Chandler*, 218 F.3d at 1315 n.

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[24] Giving petitioner the benefit of the doubt, one could argue that petitioner relies on *all* of the evidence presented in his motion for new trial and § 2255 claims to support his ineffective assistance/refusal of assistance claim. In other words, petitioner's claim is that all of the evidence presented post-trial would have been uncovered, and would have made a difference at trial, had trial counsel allowed the family to hire co-counsel and/or a private investigator. Although one might conclude that some of the evidence might have been discovered prior to trial, *e.g.*, records related to Pickens, one can only speculate whether a pretrial investigation would have uncovered other evidence relied support of this § 2255 prior to trial, *e.g.*, statements of witnesses such as Eaton and Treadwell. Moreover, for reasons discussed throughout this order, even if the evidence should have been uncovered, counsel was not constitutionally ineffective for failing to present it at trial.

16 (former counsel's admission in post-conviction proceedings "that his performance was deficient matters little" because standard is an objective one).

In Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992), a § 2254 habeas proceeding, the Eleventh Circuit addressed the effect of an affidavit from trial counsel in which he admitted that he should have presented expert testimony on a specific issue but failed to do so.

> [T]he affidavit alone establishes nothing. First, it admits no ineffective performance; *and even if it did admit ineffectiveness, we would give it the affidavit no substantial weight because ineffectiveness is a question we must decide...* Second, [petitioner] has failed to show that this omission prejudiced his defense.

Id. at 960 (emphasis added). Thus, not only are the affidavits of counsel not entitled to weight as admissions of deficient performance,[25] no prejudice has been demonstrated.

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[25] It should be noted that Mr. Kimbrough's affidavit is a somewhat equivocal admission. Mr. Kimbrough acknowledges things that he could have done but did not do. Most of the 25 numbered paragraphs in Mr. Kimbrough's affidavit begin with "I failed to..." The affidavit concludes with the statement, "I truly believe that the above-referenced assertions indicate a less than effective assistance of counsel and might have changed the way the jury viewed the [d]efendant..." (Def.'s Ex. D.) Mr. Tompkins, in his affidavit, acknowledges his "belief that [he] erred" and therefore was "ineffective" because he should have argued asserted ineffective assistance of counsel claims in the motion for new trial. (Def.'s Ex. B.)

VIII. Ineffective Assistance of Trial Counsel/Inadequate Investigation

Petitioner alleges that an affidavit from his investigator, Normand McAllister, demonstrates that counsel was constitutionally ineffective for failing to investigate, obtain and present significant evidence" to demonstrate petitioner's credibility and innocence. [Claim I(C)(16).] Of the seven items of evidence allegedly omitted due to inadequate investigation,[26] six relate to Robert Pickens. Five of those six items of evidence related to Pickens are extrinsic evidence of impeachment which would have been inadmissible under Fed. R. Evid. 608(b). Therefore, counsel's failure to discover these items through a more thorough investigation caused no prejudice to petitioner. Likewise, petitioner was not prejudiced by counsel's failure to discover the remaining evidence related to Pickens-hospital records that presumably demonstrate he testified falsely when he stated he was unconscious from the time of the automobile wreck until he awoke in the hospital. As the Court held in the order denying the motion for new trial, this amounts to impeachment on an immaterial point. Finally, the affidavit points to a letter that petitioner wrote to the Marengo County Commission requesting more money for overtime pay for drug enforcement purposes that would have "corroborate[d] [petitioner's] testimony that he was working hard to enforce the drug laws." (Def.'s Ex. F.) The letter does corroborate that petitioner was performing his job, or at least one aspect of it; however, neither petitioner's testimony about his hard work

[26] These items of evidence are enumerated in Mr. McAllister's affidavit.

enforcing drug laws nor the letter to the County Commission explain, rebut or contradict the substantial and persuasive evidence presented by the government that petitioner also used his position to extort money from certain drug dealers and to dabble in the drug business himself. Petitioner was not prejudiced by counsel's failure to uncover the letter. Furthermore, petitioner does not explain why counsel was unreasonable in failing to discover the letter since petitioner wrote the letter himself but does not allege that he told counsel about it.

IX. Ineffective Assistance of Counsel/Motion for New Trial

Petitioner asserts two arguments that relate specifically to the MFNT. First, petitioner argues that the failure of trial counsel and MFNT counsel to file the motion for new trial within seven days of the jury's verdict amounted to constitutionally ineffective assistance of counsel. [Claim I(A).] Petitioner seems to believe that the motion for new trial would have been granted if it had been filed within seven days because the motion would have been subject to a less stringent standard of review. Petitioner's second argument is a multi-layered ineffective assistance of counsel claim. Petitioner contends that MFNT counsel was constitutionally ineffective because he failed to assert in the motion for new trial that trial counsel rendered constitutionally ineffective assistance of counsel. [Claim I(E).]

Petitioner's first argument is due to be denied because it consists of nothing more than a vague,

conclusory allegation of prejudice arising from the counsel's alleged error. Petitioner does not identify any specific claim or claims raised in the motion for new trial that would have been successful if reviewed under the "interest of justice standard" rather than the "newly discovered evidence standard."[27] Instead, petitioner asserts that the evidence presented in the motion for new trial was "substantial and overwhelmingly sufficient to have created a reasonable doubt or affect confidence in the outcome of the jury verdict." (Pet.'s Brf. p. 8.) In other words, petitioner makes the classic conclusory argument, *i.e.*, if counsel had performed differently, the result would have been different.

Petitioner's next argument--that MFNT was constitutionally ineffective because he failed to assert that trial counsel was constitutionally ineffective--is almost as confusing. According to petitioner, MFNT counsel should have argued that trial counsel acted unreasonably because he failed to uncover evidence presented by MFNT counsel in the motion for new

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[27] A motion for new trial based on newly discovered evidence may be filed within three years after the verdict. A motion for new trial based on any other reason must be filed within seven days of the verdict. The former is subject to a more stringent standard of review than the latter. In general, a motion for new trial filed within seven days may be granted if the district court determines that "the interest of justice so requires." Fed. R. Crim. P. 3 3 (a). There is some disagreement among circuits as to which standard of review applies to a motion for new trial that is both (1) based on newly discovered evidence *and* (2) filed within 7 days of the verdict. *See United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999) (and cases cited therein); *United States v. Wall*, 2004 WL 2397374 (5th Cir. Oct. 27, 2004). It appears that the Eleventh Circuit would apply the less stringent standard. *See United States v. Schlei*, 122 F.3d 944, 990 (11th Cir. 1997).

trial. In support of this argument, petitioner points to certain pieces of evidence that trial counsel failed to present at trial, allegedly due to lack of due diligence. Further, petitioner concludes that he was prejudiced because the order denying the motion for new trial did not specifically find that he was not prejudiced. Petitioner's claim can be paraphrased as follows: "If MFNT counsel had pointed out trial counsel's lack of due diligence and argued constitutionally ineffective assistance, the motion for new trial would have been granted because the order denying the motion for new trial did not say otherwise."

MFNT counsel's failure to raise ineffective assistance was neither unreasonable nor prejudicial. First, petitioner's double ineffective assistance argument leads full circle back to the timeliness issue. If MFNT counsel had raised ineffective assistance, the motion for new trial would have been based on a ground other than newly discovered evidence and could not have been considered unless it was filed within seven days of the verdict. Mr. Kimbrough did not file a motion to withdraw until October 3, 1997, more than 30 days after the verdict, and Mr. Thompkins, petitioner's MFNT counsel, did not appear in this case until October 7, 1997. It was not unreasonable for Mr. Thompkins not to file a motion for new trial while petitioner was still represented by Mr. Kimbrough. Second, petitioner suffered no prejudice because the ineffective assistance arguments would not have been successful for the same reasons

those identical arguments are not successful in this § 2255 petition.[28]

X. Ineffective Assistance of Counsel/Failure to Object to Brady and Jencks Act Violations

Although petitioner's argument in this regard is rather vague, he refers to "reports on Agent Conner that were vital to his defense" because of a "tape recording that has a bearing on the way in which counsel would have cross-examined [Agent Conner]." (Pet.'s Brf. at 10-11.) [Claims I(B) & I(D)(14).] Petitioner also asserts that he is in a proverbial "Catch 22" because he does not have the tape and documents

[28] The evidence underlying the multi-layered ineffective assistance of counsel argument includes pager dead zones, bank deposits, negotiations for a jet ski purchase and the purchase of gold jewelry. Ineffective assistance arguments based on each of these evidentiary claims are discussed, *supra*, Part IV(B)(3) (bank records), Part IV(B)(6)(jet ski & bank records), Part IV(D)(2) (pager dead zones), Part IV (E)(1) (jewelry), and rejected.

and therefore cannot demonstrate prejudice.[29] Interestingly, petitioner raised similar arguments in connection with his motion for new trial, at which time he had Agent Conner's reports.[30] Therefore, his "Catch 22" argument is unavailing, and his failure to allege prejudice is fatal to his claim that counsel rendered ineffective assistance based on Conner's *reports*. The *tape recording*, which petitioner did not have in connection with the motion for new trial, was an undercover recording of a meeting between Conner and Pickens. In denying the motion for new trial the Court determined that the tape was not subject to disclosure under the Jencks Act.[31]

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[29] Petitioner's dual Jencks/Brady approach, which is far from clear, appears to be as follows: Without knowing what is in the reports and tape recording, petitioner can only argue that the information should have been disclosed, under the Jencks Act, as Conner's recorded recital of a past occurrence. Even so, petitioner cannot prove that he was prejudiced by counsel's failure to object to the government's failure to disclose. If petitioner knew what information was not disclosed, he might find that he was prejudiced, *i.e.*, that the evidence was exculpatory, or at least impeaching, and therefore subject to disclosure under *Brady* and *Giglio*. The problem with a *Brady* argument in the context of an ineffective assistance of counsel claims is this: If current counsel cannot determine the usefulness of the documents and tape recording without having access to them, how could past counsel have done so?

[30] Agent Conner's reports were an exhibit to the government's response to the motion for new trial. In his reply brief, petitioner asserted that he had never been given those reports, as required by the Jencks Act. (*See* Order on Mtn. for New Trial, pp. 19-20.)

[31] Furthermore, the order denying the motion for new trial concluded that the reports did not provide information that would have been helpful to petitioner at trial.

Therefore, counsel's failure object to the government's non-disclosure of the tape was not unreasonable because the objection would not have met with success. For the same reason, petitioner suffered no prejudice.[32]

XI. Ineffective Assistance/Failure to Preserve Apprendi Issues for Appellate Review

While petitioner's appeal was pending, the United States Supreme Court rendered its opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Petitioner argued on appeal that his sentence should be vacated because drug quantity was not alleged in the indictment or found by the jury beyond a reasonable doubt in violation of the rule set forth in *Apprendi*.[33] Because proof of drug quantity was not an issue raised at the trial level, the Eleventh Circuit subjected the claim to a more stringent standard of review. Finding no plain error, the appellate court denied relief.

Petitioner now asserts that trial counsel's failure to preserve the drug quantity issue for appeal amounted to constitutionally ineffective assistance of counsel. [Claim II.]

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[32] For the reasons discussed *supra*, n. 21, the tape recording cannot support an ineffective assistance of counsel claim based on counsel's failure to object to non-disclosure of *Brady* material.

[33] "Other than the fact of a prior conviction, any fact than increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

It is well-settled that failure to anticipate future changes in the law does not amount to ineffective assistance of counsel. *See, e.g., Spaziano v. Singletary,* 36 F.3d 1028, 1039 ("we have held many times" that reasonably effective assistance does not require predictions of how law will develop") (citing *Elledge v. Dugger,* 823 F.2d 1439, *modified on other grounds,* 833 F.2d 250 (11th Cir. 1987)). *Apprendi* was a change in the law that could not reasonably have been anticipated. *See United States v. Ardley,* 273 F.3d 991, 993 (11th Cir. 2001) (Carnes, ' \ (denying reh'g en banc) (rule that failure to anticipate change in law does not amount to ineffective assistance applies in *Apprendi* context). As recently as six months prior to the Supreme Court's decision in *Apprendi,* the Eleventh Circuit unequivocally rejected a defendant's argument that drug quantity was element of the offense that must be proven to the jury beyond a reasonable doubt. *See United States v. Hester,* 199 F.3d 1287, 1290-91 (2000) (and cases cited therein). This decision reaffirmed a line of circuit precedent. *See, e.g., United States v. Perez,* 960 F.3d 1569 (11th Cir. 1992); *United States v. Cross,* 916 F.2d 622 (11th Cir. 1990). Counsel's failure to preserve the drug quantity issue for appeal was not unreasonable and, therefore, did not amount to constitutionally ineffective assistance.[34]

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[34] Several circuits have addressed ineffective assistance of counsel claims based on counsel's failure to preserve drug quantity issues in cases tried prior to *Apprendi,* and all have concluded that counsel's failure to anticipate *Apprendi* was not unreasonable. *See, e.g., Brown v. United States,* 311 F.3d 875 (8th Cir. 2002); *United States v. Maass,* 44 Fed. Appx. 298 (10th Cir. 2002); *United States v. Haynesworth,* 34 Fed. Appx. 133 (4th Cir. 2002); *Valenzuela v. UniedStates,* 261 F.3d 694 (7th Cir. 2001).

XII. Ineffective Assistance/Failure to Raise Issue of Defective Indictment

Petitioner claims that the indictment was defective irrespective of *Apprendi* and that counsel was constitutionally ineffective for failing to raise the issue. [Claim III.] According to petitioner, the indictment was deficient because it "did not identify the statute for [sic] which Petitioner's punishment would be established, or the type or amount of drugs Petitioner was being charged with." (Pet.'s Brf. p. 42.) Counsel's failure to raise these defective indictment issues was not unreasonable for the simple reason that he had no reason to believe that any of them would have been successful.

Petitioner contends the indictment was defective because it did not allege: (1) the code section prescribing punishment; (2) drug type; or (3) drug quantity. In fact, the drug type was alleged in each count of conviction-Count Two (crack), Count Three (marijuana) and Count Seventy-Three (marijuana). For the same reasons discussed with respect to petitioner's *Apprendi* ineffective assistance claim, counsel's failure to raise the drug quantity issue was not unreasonable in light of then-existing law. Finally, petitioner's claim that the punishment section must be alleged is without any legal support. Whether an indictment is sufficient is judged by the two criteria. First, it must "contain[ ] the elements of the offense intended to be charged and "sufficiently apprise[ ] the defendant of what he must be prepared to meet and, secondly, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent

he may plead a former acquittal or conviction." *United States v. Meacham* 626 F.2d 503, 507 (11th Cir. 1980) (citations and quotations omitted). Absent *Apprendi*, the statutory punishment provision has nothing to do with any element of the offense, does nothing to apprise a defendant of the charges against him and does not provide notice of similar offenses for double jeopardy purposes. The indictment was not defective due to the lack of reference to the statutory punishment provision; therefore, counsel was not ineffective for failing to object on that ground.

XIII. Conclusion

At first glance, the sheer volume of claims asserted in this § 2255 motion might lead one to think that there *must* be a successful claim somewhere, or at least one deserving of an evidentiary hearing. To the contrary, the number of claims is indicative of the strength of the government's case. Corroboration was the key to the government's case. The depth and breadth and volume of the government's evidence against the petitioner is such that nothing short of an all-out attack on every aspect of counsel's performance could provide any hope of success.

Petitioner has pointed out many things, in hindsight, that counsel could have done differently at trial or in post-trial proceeding, but the test is not what counsel could have, or even should have, done. The right to counsel guaranteed by the Sixth Amendment guards against "a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Therefore, "[t]he

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. Petitioner's claims of attorney error do not undermine confidence that the result of the adversarial process was, in this case, fair and just.

It is, therefore, ORDERED, ADJUDGED and DECREED that the motion to vacate, set aside or correct sentence be and hereby is DENIED.

DONE this the 23rd day of November, 2004.

s/CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-10468-F

WILMER KEITH BRECKENRIDGE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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Before **ANDERSON and MARCUS, Circuit Judges.**

[ENTERED: August 26, 2005]

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated July 13, 2005, denying a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is

DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); see also Fed.R.Evid. 608(b); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); Chandler v. United States, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991).

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILMER KEITH BRECKENRIDGE,	:
Appellant/Petitioner,	:
	:
vs.	:
Case No. 97-00099-CB	
	:
UNITED STATES OF AMERICA,	:
Appellee/Respondent.	:

MOTION TO RECONSIDER,
VACATE OR MODIFY ORDER

[ENTERED AUGUST 2, 2005]

Petitioner Breckenridge petitions this Court under 11th Cir. R. 27-2 to reconsider or modify the order entered on July 13, 2005 denying his application for a Certificate of Appealability, and in support of his petition presents to the Court as follows:

I. STATEMENT OF THE CASE

Petitioner Breckenridge was indicted on a multi-count Federal Indictment in the United States District Court for the Southern District of Alabama based on an investigation into cocaine trafficking in which Breckenridge, a deputy sheriff, was alleged to have been receiving bribes from drug dealers in return for allowing drug sales and supplying drugs to drug dealers to sell in return for a share of the proceeds. The

Indictment charged Breckenridge, in pertinent part, with conspiracy to possess with intent to distribute more than 10 kilograms of crack-cocaine (Count 2), conspiracy to possess with intent to distribute more than 50 kilograms of marijuana (Count 3), and possession with intent to distribute marijuana (Count 73).

Breckenridge was found guilty on August 25, 1997 of Counts 2, 3, and 73. He was sentenced on December 12, 1997 to life without parole after making numerous objections.

William Kimbrough, Jr. represented Breckenridge prior to and during trial. Following trial, Breckenridge filed a Motion for New Trial and subsequent amended Motion for New Trial ("MFNT") through new counsel, Thomas Thompkins, asserting numerous evidentiary errors. The district court denied the MFNT in an Order dated September 11, 1998, basically because the court did not consider the evidence "newly discovered." Breckenridge filed a 2255 Petition to vacate, set aside, or correct the sentence on March 1, 2004. The Habeas Petition was denied in an order dated November 23, 2004. The court determined, in part, that Breckenridge could not be afforded relief because counsel was not ineffective for failing to conduct an adequate investigation into voluminous exculpatory evidence and, therefore, there was no constitutional violation.

Breckenridge subsequently filed a motion for a Certificate of Appealability with the district court, which was denied in an order dated April 26, 2005.

Pursuant to Fed. R. App. P. 22(b)(2), Breckenridge filed a motion for a COA with this Court on June 2, 2005, which was denied on July 13, 2005. In its order and judgment, the Court relies upon the holding in *Tejada v. Dugger*, 941 F.2d 1551 (11th Cir. 1991) that "[m]ere conclusory claims and allegations unsupported by specifics are insufficient to entitle a petitioner to habeas relief" as grounds to support the finding that "appellant failed to show either that counsel's performance was deficient in failing to call these witnesses or that counsel's failure to do so prejudiced the outcome of his case" and "[l]ikewise, appellant failed to demonstrate either deficiency or prejudice with respect to [the character evidence] claims." [Order denying COA at 2]. By reaching this conclusion, the Court misconstrued or misapplied the standard of review and applicable case law on a significant issue in Petitioner Breckenridge's request for a Certificate of Appealability. Petitioner is not making "conclusory" claims. He has supported each one with evidence. *Tejada* does not apply to Petitioner's case. The court did not apply the proper standards of fact and law to Petitioner's case. In the application of the facts to the accepted law and standards of review a different result would occur.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

A petitioner seeking a Certificate of Appealability need only demonstrate "a substantial showing of the denial of a constitutional right." 28

U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 335-37 (2003). This standard is satisfied when the "[habeas] petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." *Id.*; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, the application for a COA should not be denied merely because the court believes the petitioner will not prove an entitlement to relief. *See Miller-El*, 537 U.S. at 337 (finding that "[a] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail").

In evaluating a constitutionally ineffective assistance of counsel claim, *Strickland v. Washington*, 466 U.S. 668 (1984), instructs that this court must determine whether "counsel's representation fell below an objective standard of reasonableness," and, if so, whether there is a "reasonable probability" that the ineffectiveness prejudiced the outcome at trial. *Id.* at 688, 694.

As *Strickland* explains, the range of reasonable professional judgments is wide and courts must take care to avoid illegitimate second-guessing of counsel's strategic decisions from the superior vantage point of hindsight. 466 U.S. at 689. It is, therefore, only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied

in scrutinizing counsel's performance. *Id.* at 689-90; *see also Sullivan v. Fairman*, 819 F.2d 1382, 1391 (7th Cir. 1987) ("few petitioners will be able to pass through the 'eye of the needle' created by *Strickland*" (citation omitted)).

However, "the Supreme Court certainly did not intend the *Strickland* analysis to be a total barrier to relief." *Id.* at 1391. In the context of defense counsel's duty to investigate, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. *See Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). Although an attorney's informed strategic choices are generally given great deference, an attorney's preparatory activities are closely scrutinized. *Chambers v. Armontrout*, 907 F.2d 825, 831, 835 (8th Cir. 1990) (en banc).

Thus, the courts of appeals are in agreement that failure to adequately conduct a pretrial investigation generally constitutes a clear instance of deficient performance. *See, e.g., Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel's performance fell below competency standard where he interviewed only one witness); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) ("at a minimum, counsel has the duty to

interview potential witnesses and to make an independent investigation of the facts and circumstances of the case"); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) ("Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation"); *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) ("A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance").

Yet, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To merit habeas relief, "the defendant must [also] show that the deficient performance prejudiced the defense." *Id.* at 687. The level of prejudice the defendant need demonstrate lies between prejudice that "had some conceivable effect" and prejudice that "more likely than not altered the outcome in the case." *Id.* at 693. Thus "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The *Strickland* standard does not require a showing that the defendant could not have been convicted; instead the Court defined "reasonable

probability" as one that "undermine[s] confidence in the outcome." *Alexander v. Armontrout*, 985 F.2d 976, 978 (8th Cir. 1993); *Strickland*, 466 U.S. at 694. Therefore, in assessing prejudice, the appropriate question is "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695. A verdict that is only weakly supported by the record is more likely to be affected by errors than one with overwhelming record support, and, in such a case, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 696; *United States v. Agurs*, 427 U.S. 97, 113 (1976).

Strickland directs that the effect of counsel's inadequate performance must be evaluated in light of the "totality of the evidence before the judge or jury," keeping in mind that "[s]ome errors have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. . . ." *Id.* at 695-96, as in Petitioner's case counsel's errors are, therefore, to be considered in the aggregate. *See Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that court should examine cumulative effect of errors committed by counsel); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999) ("Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense"); *cf. Rodriguez v. Hoke*, 928 F.2d 534, 538 (2nd Cir. 1991) (dismissing case for failure to exhaust claims, but noting, "[s]ince [the defendant's] claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his

allegations of ineffective assistance should be reviewed together"); *McNeil v. Cuyler*, 782 F.2d 443, 450 n.2 (2nd Cir. 1986) (evidence that would have been obtained by counsel had he conducted a reasonable investigation must be assessed in relation to the record as a whole to determine whether there is a reasonable probability that such evidence would have led the jury to have a reasonable doubt respecting the defendant's guilt).

B. Discussion

In his COA, Petitioner Breckenridge meticulously itemized evidence that counsel could have discovered through an adequate pretrial investigation for use at trial. The evidence can be grouped accordingly:

1. The testimony of 18 witnesses, which would have (a) directly impeached the testimony of the government's key witnesses, (b) corroborated Breckenridge's testimony (the only evidence presented by the defense at trial), and (c) advanced a viable theory of defense that Breckenridge was framed for the crime [COA at 37-59];

2. Character evidence showing that the government's key witness had the propensity for untruthfulness, which would have further undermined the government's case [COA at 60-64]

and allow jurors to question if the government had proven its case.

3. Counsel's admissions of ineffective assistance of counsel on material issues that specifically undermined confidence in the outcome of the trial.

4. Breckenridge also established that counsel's failure to investigate was not a tactical or strategic decision through the incorporation of counsel's affidavit:

> . . . there was evidence that could have been obtained with the exercise of due diligence prior to trial either by myself or by hiring a private investigator [which would have] been significant to counter the evidence that the Government presented to the Court [and] could have made a difference in the outcome of the trial . . . [the evidentiary errors] occurred in the case which in part related to my failure to conduct a better investigation.
>
> [COA at 25].

Breckenridge specifically asserted that counsel's deficient performance prejudiced his defense: "The

effect of the cumulative omissions [of evidence] clearly denied Breckenridge a viable theory of defense." [COA at 63]. Such a showing satisfies the *Strickland* standard in demonstrating that counsel was constitutionally ineffective.

An overwhelming amount of case law from various circuits supports such a finding. In *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993), for example, the Court found that defense counsel's performance was deficient when he failed to investigate an impotency defense in a rape case, even though the attorney presented an alibi defense at trial, because "the vulnerability of the alibi evidence shows the unreasonableness of the attorney's failure to investigate further and present the impotency defense." *Id.* at 726. The *Foster* Court further noted that "[the defendant's] attorney focused only on whether [the defendant] possibly could have committed the crime and not on whether or not it was likely he could have committed the crime." *Id.* (internal quotation and citation omitted). As the evidence showed that the defendant was incapable of committing the crime in the manner the government alleged at trial, the *Foster* Court concluded there was a reasonable probability that the trial's outcome would have been different with the evidence and, thus, counsel's deficient performance prejudiced the defense. *Id.* at 727.

In *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989), counsel's performance was deemed to fall below the minimum standard of reasonable professional representation required under *Strickland* for failing to pursue a given line of investigation when his "behavior

was not colorably based on tactical considerations but merely upon a lack of diligence." *Id.* at 712. The *Gray* Court based its finding on counsel's admission that he made no effort to interview potential witnesses, the fact that counsel did not hire an investigator to locate potential witnesses, and because counsel offered no strategic justification for his failure. *Id.* (This is in part with Petitioner Breckenridge's overwhelming evidence. Further, because the defendant in *Gray* offered evidence to the court as to the testimony available from specific witnesses that counsel failed to interview who would have corroborated the defense and cast doubt on the government's case, the court held that counsel's ineffective assistance prejudiced the defendant. *Id.* at 714. Clearly Breckenridge meets and/or exceeds this burden.

In *Horton v. Massey*, 203 F.3d 835 (10th Cir. 2000) (unpublished), counsel's performance was adjudged constitutionally ineffective in relation to his failure to adequately investigate the case "in light of the avenues that he could have taken to present significant evidence that the [government's] key witnesses collaborated with one another and were lying about both their and petitioner's participation in the [crime]." In *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999), counsel's performance was determined to fall outside the wide range of professionally competent assistance that *Strickland* requires when he chose not to develop and use evidence available at his fingertips that could have undermined the government's case and offered no persuasive justification for such a decision. In *Williams v. Washington*, 59 F.3d 673, 679-685 (7th Cir. 1995), counsel's failure to investigate was held to meet the

Strickland standard where an investigation would have disclosed information bolstering the defendant's credibility and rebutting the government's case because the defendant was provided "with a trial significantly different than she might have received if represented by a competent attorney." In *Nealy v. Cabana*, 764 F.2d 1173, 1180 (5th Cir. 1985), the Court concluded that the defendant met the burden of showing prejudice related to counsel's failure to investigate under *Strickland* where the testimony of missing witnesses directly contradicted prosecution witness and supported defense's theory of the case.

Likewise, in the present case, Breckenridge's assertion in his COA that there was evidence available from specific witnesses that counsel admittedly failed to investigate which would have corroborated his defense and undermined the government's case, coupled with the vulnerability of the defense and counsel's admission that his failure to investigate and use such evidence was not a strategic decision, demonstrates that counsel's performance was deficient. Focusing, as this Court must, "on the fundamental fairness of the proceeding whose result is being challenged," *Strickland*, 466 U.S. at 696, the cumulative effect of the omitted evidence resulting from the ineffective assistance of Breckenridge's counsel prejudiced him to the extent that it undermines confidence in the outcome of the trial, *i.e.*, there is a reasonable probability that the trial's outcome would have been different with evidence impeaching the government's key witnesses, corroborating Breckenridge's testimony, and advancing a viable theory of defense, thus providing Breckenridge with a

significantly different trial than he might have received if represented by a competent attorney. This Honorable Court's reliance on *Tejada v. Dugger*, 941 F.2d 1551 (11th Cir. 1991), in denying the COA is unfounded, especially in light of the fact that the evidentiary omissions by the defendant's counsel were not within the realm of strategic and tactical decisions. *Id.* at 1559. *Tejada* applies to unsupported claims. Petitioner claims are clearly supported.

Petitioner Breckenridge met or exceeded the burden of making a substantial showing of the denial of his constitutional right to effective assistance of counsel in the COA as required by 28 U.S.C. § 2253(c)(2), and the COA should have been granted on this issue.

In the very least, Breckenridge is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel relating to counsel's failure to investigate. A petitioner is entitled to an evidentiary hearing if he alleges facts, which, if true, would warrant habeas relief. *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) (en banc); *see also Futch v. Dugger*, 874 F.2d 1483, 1485 (11th Cir. 1989) (evidentiary hearing warranted if material facts not adequately developed in district court or state habeas proceeding); *United States v. Yizar*, 956 F.2d 230, 234 (11th Cir. 1992) (district court most hold evidentiary hearing where court cannot state conclusively that the facts alleged by petitioner, taken as true, would present no grounds for relief). If the material facts alleged in the COA concerning this issue are taken as true, it cannot be conclusively said that there are no grounds warranting habeas relief on this

issue. In addition, an evidentiary hearing is necessary to adequately develop the record as asserted in the COA: "this is particularly true in light of the fact that the Court of Appeals refused to review these claims on direct appeal because the record had not been established regarding the merit of the claim(s)." [COA at 79]. Therefore, contrary to this Court's order denying the COA, Breckenridge's claim of ineffective assistance of counsel relating to this issue requires an evidentiary hearing.

III. CONCLUSION

In conclusion, the Court misconstrued or misapplied the standard of review and applicable case law on a significant issue in Petitioner Breckenridge's request for a Certificate of Appealability. Accordingly, the order denying Breckenridge's COA should be reconsidered or modified to grant the COA on the claim of ineffective assistance of counsel relating to counsel's failure to investigate, or, at the very least, remand for an evidentiary hearing. Petitioner's evidence far exceeds any other granted Habeas Petition referenced. Therefore, Petitioner has met or exceeded his burden of proof to be granted relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this day served a true and correct copy of the foregoing Motion to Reconsider or Modify Order via the United States Postal Service to the Eleventh Circuit Court of Appeals. Same will be forwarded to Assistant United States Attorney, Rusty Loftin, via the United States Postal Service.

This 1st day of August, 2005.

Respectfully submitted,

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